SUPREME COURT, U. S.

No. 74-513

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In the Supreme Court of the United States

OCTOBER TERM, 1974

LEONARD L. CAPPETTO, STANLEY J. MIKOLAJCZAK, JOSEPH A. CORABI, THOMAS J. WILSON, JOSEPH I. MANTIA, GEORGE J. MUSTEIKAS and NICHOLAS J. PIDONE,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No.

LEONARD L. CAPPETTO, STANLEY J. MIKOLAJCZAK, JOSEPH A. CORABI, THOMAS J. WILSON, JOSEPH I. MANTIA, GEORGE J. MUSTEIKAS and NICHOLAS J. PIDONE,

Petitioners,

VS.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

May It Please the Court:

Petitioners Leonard L. Cappetto, Stanley J. Mikolajczak, Joseph A. Corabi, Thomas J. Wilson, Joseph I. Mantia, George J. Musteikas and Nicholas J. Pidone pray that a Writ of Certiorari be issued to the United States Court of Appeals for the Seventh Circuit for review of the judgment of said court reflected by the opinion herewith submitted as Appendix "A" (Separate Volume).

A. Reference to Reports

The opinion of the Court of Appeals, review whereof is hereby sought, is reprinted as Appendix A, pages 1 through 10 of the separate Appendix volume accompanying this Petition.

It is officially unreported to the present time. However, a digest of that opinion with extensive quotations is reported at 16 Cr L 2001.

The judgment of the district court is unreported. It is reprinted as Appendix C, and consists in an oral memorandum (App. 14-20), a default order (App. 20-22), a decree of preliminary injunction (App. 22-27) and a judgment and commitment (App. 27-28).

B. Statement of Grounds on Which Jurisdiction Is Invoked

1. The judgment of the Court of Appeals was entered on September 4, 1974.

2. A Petition for Rehearing was timely filed, and was denied on October 1, 1974.

3. The jurisdiction of this Court is conferred by 28 U.S.C. Sec. 1254(1).

C. Questions Presented for Review

1. Where the government files an action seeking an adjudication that the defendant has committed certain "racketeering" felonies, and requests an injunction restraining future felonies together with extensive restrictions and supervision of the conduct of that defendant,

And where the defendant has not been convicted of any such felony in any prior proceeding,

(a) Is the defendant entitled to demand proof of his guilt beyond reasonable doubt? Alternatively, may judgment be entered against him by default?

(b) Does the defendant enjoy Fifth Amendment immunity against being compelled to act as a witness against himself?

(c) Is the defendant entitled to trial by jury?

(d) Does the defendant enjoy any other criminal constitutional guarantees, such as the right of confrontation and the right to counsel?

2. In filing an action under 18 USC 1964, is the government required to allege any special circumstance necessitating equitable intervention? Alternatively, are the district courts required indiscriminately to enjoin every alleged violation of 18 USC 1962?

3. Is every violation of the federal gambling statute also a per se violation of 18 USC 1962, which forbids the use of gambling to acquire or conduct a business which influences interstate commerce?

4. Does the decision of this Court in *Perez* v. *United States*, 402 U.S. 146 (1971) authorize a federal statute prohibiting gambling without the necessity of proving interstate activity?

D. Statutes Involved

The action below was based upon five separate statutes which, because of their unusual length, are reprinted within the separate Appendix volume herewith submitted.

The statutes appear as Appendix D of that separate volume, and are there paginated as follows:

PAGE

18 USC Section 1955 (Illegal Gambling Businesses) .....App. 29-31
18 USC Section 1961 (Definitions) .....App. 31-33
18 USC Section 1962 (Prohibited Activities .....App. 33-34
18 USC Section 1963 (Criminal Penalties) ..App. 34-35
18 USC Section 1964 (Civil Remedies) .....App. 35-36

E. Statement of Facts

The Government's Pleadings

In October of 1973, the District Court entered an order approving a wiretap on the telephone of Western Avenue Billiards, 8024 South Western Avenue, Chicago, Illinois. Over a period of some two weeks, the eavesdropping agent heard petitioners Corabi, Mikolajczak and Wilson accepting wagers on football games and horse racing (R. 37-38). On approximately a daily basis, or somewhat less, he heard petitioners Mantia and Musteikas placing bets over the telephone (R. 38-39). A person tentatively identified as petitioner Pidone was seen to enter the premises on several occasions, and Wilson was once observed leaving Pidone's house (R. 41-42). Several other persons, identified only by nicknames, were also heard placing bets (R. 39). As interpreted by the surveilling agents, the total betting volume exceeded $2,000 on four different dates, ranging from $5,375 to $26,670. (R. 44-45)

Some three and a half months later, the government filed its "complaint for injunction" against all petitioners pursuant to 18 USC 1962. It was alleged that the defendants

were engaged in gambling which "daily results in the diversion of money and goods from legitimate enterprises into illegal and illegitimate channels" (App. 41). The activity was alleged to violate Section 1962 in two respects:

1. It was charged that the collection of gambling proceeds enabled the defendants to maintain their gambling business, which was an enterprise engaged in interstate commerce. Thus, allegedly, the activities violated Section 1962 (b). (App. 42)

2. It was further charged that the defendants, being engaged in an interstate business—i.e., gambling—had conducted the affairs of that enterprise through racketeering activity—i.e., gambling—thus allegedly violating 18 USC 1962 (c). (App. 42-43)

A third count alleged that the defendants had also violated 1962 (d), since their activities constituted a conspiracy. (App. 43-44)

The complaint sought the following relief:

1. A sweeping injunction forbidding all petitioners from engaging in any form of gambling (App. 44-45).

2. An immediate temporary restraining order to the same effect, to be followed by a preliminary injunction (App. 45).

3. Divestiture of the billiard parlor (App. 45).

4. Disclosure of the identities of all gambling customers known only by nickname (App. 45-46).

5. An order requiring each petitioner to report quarterly to the United States Attorney for a period of ten years concerning all his personal activities and income, together with any other information that might appear "necessary and proper to carry out the purposes of Section 1964" (App. 46).

6. Unspecified "further and different relief which the court may deem just and proper" (App. 46)

Initial Ex Parte Proceedings

Contemporaneously with the filing, the government moved *ex parte* for a temporary restraining order prohibiting all gambling by all defendants, (R. 29) and to compel the defendants to disclose immediately the identities of those customers as to whom the wiretap had disclosed only nicknames (R. 31). The TRO was sought without notice on the grounds that unless it were granted the gambling would continue, and "that the defendants are likely to avoid service of process and this order if notified thereof in advance" (R. 31). The motion was supported by the affidavit of the agent conducting the wiretap (R. 33-48). At the same time, the government filed notices of depositions of the defendants to commence five days after the filing of the suit (R. 48-49). It also filed very extensive requests for admissions, directed against each of the defendants, and extending to all the significant allegations of the complaint (R. 50-75).

In *ex parte* proceedings, the district court entered an order requiring the defendants to answer all requests for admissions within five days from the date of service, "inclusive of Saturdays and Sundays". (R. 77). The court also entered a temporary restraining order as prayed by the government, including a provision requiring the defendants to disclose the names of those customers known only by nickname within five days from the date of the order (R. 79-84).

Defensive Pleadings and Motions

Petitioners moved to dismiss the complaint and dissolve the restraining order, citing numerous claims of constitutional deprivation (R. 119-122).

They further objected to the requests for admissions on the grounds that said requests are violative of the Fifth Amendment (R. 123). They urged the same objection in response to the order requiring disclosure of the names of gambling customers (R. 124-125).

Petitioners consistently urged that the case should be viewed as a criminal matter for the purpose of determining the rights available to them. As their pleading on the merits, they filed a formal plea of Not Guilty to each count of the complaint, and demanded a jury trial.

Petitioner Corabi appeared for deposition as scheduled, but refused to testify. That refusal was not based on the assertion that any answer would incriminate him; instead, it was based on the primary Fifth Amendment immunity which protects the accused in a criminal case from all compulsion to testify at the demand of the prosecution (R. 127).

Petitioners then moved to dissolve the temporary restraining order and to dismiss the proceedings. These motions cited extensive claims of constitutional impropriety stemming from failure to accord to Petitioners the rights of persons accused of crime, and challenged the legal sufficiency of the allegations of the Complaint (R. 135-142.) They also challenged the constitutionality of the enabling Statute (R. 169-178).

The Decision of the District Court

The district court overruled every objection and motion presented by Petitioners, ruling that the case should be viewed as entirely civil in character and that the statutes were constitutionally proper. (App. 14-20). Accordingly, it denied the motion to dismiss the action, entered a "use" immunity order as to Corabi, and granted the government full discovery.

Petitioners persisted in their refusal to comply with the discovery orders. The government moved for sanctions, including a default adjudication and commitment for contempt. That motion was granted. Petitioners' refusal to grant discovery became the basis for a default order and injunction (App. 20, 22) and for a further order committing them for contempt of court by reason of that same refusal to grant discovery. (App. 27) Execution of the commitment order was stayed pending review.

The Decision of the Court of Appeals

Petitioners appealed to the Court of Appeals from both the contempt judgment and the injunction.

The Court of Appeals affirmed the judgment below (A. 1), holding essentially that:

1. The remedies provided by 18 USC 1964 are not punitive, and therefore the defendants are not entitled to criminal procedural safeguards (App. 8).

2. Precedent for such actions is found in anti-trust, pure food and other statutes regulating economic activities (App. 6-8).

3. The government may properly prohibit all gambling as a *per se* interference with interstate commerce (App. 4-5).

4. Civil injunctive relief is available to remove any form of interference with interstate commerce (App. 5-6).

F. Federal Jurisdiction

No State court proceedings are involved. The original jurisdiction of the United States District Court was invoked by the respondent pursuant to Title 28, United States Code, Sec. 1345, in that the United States was party plaintiff, and under Title 18, United States Code, Secs. 1964(a) and 1964(b) (App. 35).

REASONS RELIED ON FOR ALLOWANCE OF WRIT

I.

WHEN THE GOVERNMENT FILES A COMPLAINT WHOSE PRIMARY ALLEGATION IS THAT THE DEFENDANT HAS COMMITTED A FELONY, THE ACTION CANNOT BE CONSIDERED A ROUTINE "CIVIL" CASE FOR PURPOSES OF DELINEATING THE RIGHTS OF THAT DEFENDANT.

The Implications of This Issue

This is a landmark case, in every sense of that term and by any standard. The necessary implications are a fundamental revision of the relationship between citizen and sovereign, with a change in the basic philosophy of criminal accountability from the accusatorial to the inquisitorial. As an incident of this proposed change, these petitioners have been adjudicated to have committed a felony, and have been subjected to serious jeopardy and sanctions by reason of that adjudication, while being denied every constitutional safeguard mandated in such matters.

The opinion below holds that it is constitutionally proper for government—presumably any government, state, federal or local—to file a civil inquest against any suspect citizen, in order to force him to disclose whether he had committed or is likely to commit a crime. The procedural rules and safeguards applicable in such a proceeding, in the view of the Court of Appeals, are precisely the same as though the complaint sought recovery for damage to a mail truck sustained in a routine traffic accident.

If the government's allegations are sustained, the defendant is adjudicated to be a "racketeer". (18 USC 1961-1964, A. 31-36). That characterization may be just as opprobrious in terms of both stigma and consequence, as is a criminal conviction.

Yet, in the course of such a proceeding, the defendant is denied the standard of reasonable doubt (in fact the opinion below expressly authorizes judgment by default); the primary Fifth Amendment privilege against self-incrimination; trial by jury; the right of confrontation; and, presumably, all other criminal constitutional niceties such as appointment of counsel.

That is done in the name of expediency. The government contends that this procedure is designed for "situations which are not susceptible to proof of a criminal violation." (R. 185) But the entire distinction between an accusatorial and an inquisitorial system of criminal justice, is that in the latter a man may not be branded as a criminal "in situations which are not susceptible to proof of a criminal violation."

In terms of penalties and forfeitures, the "civil" criminal is not guaranteed a more lenient fate than is his constitutionally convicted counterpart. The statute authorizes any "appropriate" judgments (18 USC 1964(a), A. 35, 36). In this case, the government sought, inter alia:

> (a) A quarterly report from each defendant under oath, for a period of ten years, describing all business activities, income, and any other information that might from time to time be considered "necessary and proper" (App. 46). The primary distinction between this "relief" and criminal probation is that the maximum term of criminal probation is only five years. 18 USC 3651.

(b) A lifetime injunction against participation in any gambling activity, probably including such as might be otherwise lawful (App. 44-45).

(c) Divestiture of an otherwise legitimate billiard parlor, because a telephone in that billiard parlor had allegedly been used for gambling (App. 45).

(d) "Such other, further and different relief which the Court may deem just and proper." (App. 46)

Thus, the petitioners are subject to ten years' probation (*sub nomine* reporting requirement); disqualification from certain legitimate occupations (*sub nomine* divestiture in conjunction with injunction and reporting requirements); and lifetime restrictions (the combined effect of injunction, reporting requirement, and unspecified "further and different relief". That jeopardy results from the government's accusation that the petitioners have committed a felony within the statutory definition of "racketeering" (18 USC 1961-1964, App. 31-36), punishable by twenty years' imprisonment.

The tenuous quality of the distinction between a "reporting requirement" and classic criminal probation, reflects the equally narrow distinction between the "civil" action under 1963 and a criminal prosecution. Both are brought by the government to obtain relief in consequence of criminal offenses allegedly committed by the defendant. In the "civil" prosecution, the government does not request immediate penitentiary confinement for the defendant. That right is not surrendered; it need not even be deferred, in view of the Court of Appeals' holding that the civil and criminal remedies may be sought sequentially or concurrently (A. 7). The government grants no other forbearance; except as above stated, every right of the criminal prosecutor is retained.

In exchange for that meager consideration, the government here claimed and obtained, over defense objection, exemption from all Fifth and Sixth Amendment restrictions, and significant impairment of Fourth, Eighth and Ninth Amendment rights.

The government sought and obtained an express adjudication that the petitioners had committed a felony. (App. 25) It obtained sanctions against the petitioners by reason of that adjudication.

However, proof beyond reasonable doubt was not required. The adjudication was entered, quite literally, by default.

Petitioners were defaulted because they refused to testify against themselves. Since this was a civil case, they were deemed to enjoy no such protection. Their obstinate refusal to prove themselves felons generated not only a default order, but a contempt adjudication as well.

Their demand for trial by jury was denied, as were all other safeguards which have heretofore attended adjudications of felonious conduct.

The opinion below claims precedential support in some areas. But the result is a fundamental and sweeping revision of our system of criminal justice.

It is not a change for the better. Our Constitution as written was preferable, in Petitioners' view.

We here challenge not only the constitutionality of the procedures adopted below, but the interpretation which renders the enabling statute applicable to the facts of this

case. Under that interpretation, however, the same handling accorded these petitioners is mandated for every person suspected of any one of a broad and diverse list of offenses, including murder, arson, robbery, welfare fund embezzlement, white slavery, transportation of stolen property and bankruptcy fraud.

Even so, it would be naive to imagine that the present statute represents, or even approaches the ultimate reach of this new technique. History compels acknowledgment that procedural weapons find employment proportionate to their force and efficacy. On that premise, it appears quite inevitable that as quickly as the opinion below can be embellished with the notation *"Cert. Den."*, the technique will commence its spread across the spectrum of every criminal code, and to every governmental unit, federal, state and local.

The Effect of the "Civil" Label.

In the articulated view of the trial court, no criminal safeguard is applicable to this proceeding because the judgment cannot include fine or imprisonment (A. 15, 16). The Court of Appeals upholds this view, stating that no "sanctions of a criminal nature" or "forfeitures" are involved (A. 8).

That approach, however, is contradicted by many recent expressions of this Court. The requisite procedural safeguards are to be determined by the objective of the proceeding and by the nature of the rights involved. *United States* v. *Kras*, 409 U.S. 656, 659 (1973). As stated in *Bell* v. *Burson*, 400 U.S. 535, 540 (1971), "a procedural rule that may satisfy due process in one context may not necessarily satisfy procedural due process in every case".

The constitutional significance of the jeopardized interests is the true measure of the scope of the procedural rights constitutionally mandated in any given case. *Ortwein* v. *Schwab*, 410 U.S. 656, 659 (1973). As has been aptly noted:

> "(S)ome 'non-jail' penalties are more serious than brief jail sentences". *Argersinger* v. *Hamlin*, 407 U.S. 25, 52 (1972), dissent of Mr. Justice Powell.

It cannot reasonably be denied that the implications and consequences of the judgment sought here are very much more serious than the normal criminal prosecution for drunken driving or disorderly conduct. In those cases, a ten-day jail sentence is normally considered severe; but the full panoply of constitutional rights extended in felony cases (excepting only trial by jury) is available. This case seeks to impress upon the petitioners the status of convicted felons for all practical purposes, not excluding most incidents of a provable felony record. If the government achieves a significant portion of the relief which it seeks, the judicially imposed consequences of the petitioners' alleged felonious activity will follow them through the rest of their lives. Yet, they have been denied every criminal constitutional safeguard, including Fifth Amendment rights which would have been required if the government had sought nothing more than forfeiture of a used car. *United States* v. *U.S. Coin and Currency*, 401 U.S. 715, 721-722 (1971); *Boyd* v. *United States*, 116 U.S. 616, 633-634 (1886); *One 1958 Plymouth Sedan* v. *Pennsylvania*, 380 U.S. 693, 696-698 (1965).

In the view of the Court of Appeals, this result is justified by resort to the precedent of statutory schemes for

enforcement of trade regulations in the field of anti-trust, cosmetic, pure food and similar statutes (A. 6, 7).

Trade regulation procedures, however, present no meaningful analogy to the present case. Procedures appropriate to regulate the purity of food and cosmetics are not necessarily valid when employed in felony cases. That is merely another reflection of the doctrine of *Bell* v. *Burson*, 402 U.S. 535, 540 and *Ortwein* v. *Schwab*, 410 U.S. 656, 659 which demonstrate that the dimensions of the interests involved determine, within reasonable limits, the demands of due process. This Court has always recognized the profound constitutional distinction between general regulatory activities in an "essentially noncriminal" area, and activities whose targets are a "highly selective group inherently suspect of criminal activities." *California* v. *Byers*, 402 U.S. 424, 427-431 (1971). Procedures appropriate to the regulation of trade are not, by that fact alone, legitimized in their application to serious felony charges.

The regulatory statutes vindicate values totally different from those involved in felony statutes. Criminal penalties involved in trade regulation are relatively minor, and are imposed on a basis of absolute liability because they are designed to meet situations in which "mere negligence may be dangerous" (*United States* v. *Balint*, 258 U.S. 250, 252) or which, "in the circumstances of modern industrialism are largely beyond self-protection" (*United States* v. *Dotterweich*, 320 U.S. 277, 280-281.) The *mens rea* requirement is eliminated because the offenses are deemed minor (*Morrissette* v. *United States*, 342 U.S. 246) and because the "penalties serve as effective means of regulation". (*United States* v. *Dotterweich*, 320 U.S. 277, 280-281).

We believe that the *Morrissette* court would have been startled by the suggestion that procedures appropriate to trade regulation may properly be employed to curb criminal offenses punishable by twenty years' imprisonment.

The availability of constitutional guarantees is not to be determined by arbitrary labels. *In re Gault,* 387 U.S. 1, 50 (1967); *Specht* v. *Patterson,* 386 U.S. 605, 608-609 (1967). It is no more appropriate to determine the constitutional implications of a felony accusation by reference to trade regulation proceedings, than to apply the full panoply of criminal due process guarantees to the curtailment of the distribution of contaminated foods.

The Interests Involved and the Rights Denied.

As noted, the complaint sought an adjudication that the defendants had committed felonies, and claimed the impositions of sanctions in favor of the government by reason of those felonies. The effect of those sanctions are, at a minimum, the stigma of felony adjudication and a lifetime bar against a few lawful activities (as well as some which are illegal). For the first ten years, the petitioners stand in jeopardy of a restriction upon their activities whose unprecedented nature precludes precise delineation.

The values, in short, are very meaningful. The procedural safeguards denied to petitioners are no less meaningful.

THE PRIVILEGE AGAINST SELF-INCRIMINATION.

The government demanded, through the civil devices of request for admission and deposition, that the petitioners provide the proof to substantiate the allegations of the government's complaint against them. That approach was consistent with its view that Section 2964 was designed to

"enable the government to intervene in many situations which are not susceptible to proof of a criminal violation." (R. 185) As the government advised the court,

> "Discovery (from the petitioners) is necessary in order to go ahead with the (government's) case." (R. 286)

Petitioners declined to supply the elements necessary to their adjudication as felons. Thereupon, on the government's application, petitioners[1] were granted "use" immunity under 18 U.S.C. 6002.

This application of Section 6002 was unusual, to say the least. In *Kastigar* v. *United States*, 406 U.S. 441, 461 (1972), your Honors held that the limitation on the use of information obtained under 6002 "is analogous to the Fifth Amendment requirement in cases of coerced confessions . . ." The articulated purpose of the immunity granted in this case, was to obtain from the petitioners information to be used against them in the same case. In short, the petitioners were required to surrender their Fifth Amendment rights in exchange for a promise that the information would not be used against them for any purpose—other than to obtain an adjudication that they had committed a felony and to impose sanctions against them by reason of that adjudication.

Very obviously, the government would not be permitted to use a coerced confession to obtain relief against the victim of that coercion, even though that relief did not

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[1] "Use" immunity was directly granted to petitioner Corabi (App. 21). It was agreed that the determination as to Corabi would serve as the "test case" on the availability of such immunity as a means to coerce testimony from all the petitioners (R. 236, 247, 252). All petitioners were adjudged in contempt for their refusal to testify, although all claimed Fifth Amendment privilege (App. 27).

include fine or imprisonment. *Boyd* v. *United States,* 116 U.S. 616, 633-634 (1886); *United States* v. *U.S. Coin and Currency,* 401 U.S. 715 (1971); *One 1958 Plymouth Sedan* v. *Pennsylvania,* 380 U.S. 693, 696-698 (1965).

In this aspect, the language of *Boyd* is particularly apposite:

> "We are also clearly of opinion that proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offenses committed by him, though they may be civil in form, are in their nature criminal * * * If the government prosecutor elects to waive an indictment, and to file a civil information against the (defendant)—that is, civil in form—can he by this device take from the proceeding its criminal aspect and deprive the (defendants) of their immunities as citizens, and extort from them a production of their private papers, or, as an alternative, a confession of guilt? This cannot be. The information, though technically a civil proceeding, is in substance and effect a criminal one." *Boyd* v. *United States,* 116 U.S. 616, 633-634 (1886)

The *Boyd* doctrine retains its original vitality. In 1971 this Court held, following *Boyd,* that in a civil forfeiture proceeding for seizure of gambling proceeds, the Fifth Amendment confers the right to remain silent, forbids forfeiture based on the defendant's silence, and requires the return of the money in the absence of proper extrinsic proofs. Pointing out that a gambling forfeiture is designed "to impose a penalty only upon those who are significantly involved in criminal enterprises" (401 U.S. at 721-722), your Honors held that the Fifth Amendment prohibited a forfeiture based solely upon the defendant's silence, notwithstanding denomination of the proceeding as "civil". *United States* v. *U.S. Coin & Currency,* 401 U.S. 715 (1971).

The Court of Appeals distinguished *Boyd, U. S. Coin,* and *One 1958 Plymouth Sedan* by pointing out that no forfeiture is involved in this case (App. 8). Presumably, the court below drew a distinction between a forfeiture and a divestiture, since in the latter case the defendant receives the sale price of the property.

In view of the express constitutional dimensions of the safeguard, we think that the distinction between forfeiture and divestiture is extremely tenuous as applied to a felony accusation, particularly where no special circumstances are pleaded to justify equitable intervention. Just as in *Boyd,* this proceeding was brought against petitioner allegedly "by reason of offenses committed by him." 116 U.S. at 633. Just as was true in *U.S. Coin,* these statutory remedies are designed for use only against "those who are significantly involved in criminal enterprises." 401 U.S. at 721.

Nor does the fact that petitioners have not yet been subjected to divestiture or to the probation-type "reporting requirement" diminish the force of their Fifth Amendment protection. They are in jeopardy of such a judgment, and the protection of the Fifth Amendment is not limited to those against whom judgments have been entered.

But aside from even these considerations, it remains the stark fact that the judgment below expressly finds that the petitioners have committed a felony (App. 25). Petitioners' interest in these proceedings is, for that reason, a far stronger one in terms of constitutional safeguards than was the interest protected in *One 1958 Plymouth* and in *U.S. Coin.* That interest is the right not to be branded judicially as a felon in the absence of proper proofs introduced against a background of full constitutional protection. *In re Winship,* 397 U.S. 358, 364 (1970).

Nothing suggested by this Court's decision in *Kastigar* v. *United States,* 406 U.S. 441 (1972) dictates the result reached below. *Kastigar* compels a surrender of Fifth Amendment privilege in exchange for "use" immunity, even though a disclosure of the witness' own criminality may result. But *Kastigar* is bottomed on the public's need for the information sought from that witness, in order to do justice to others. *Kastigar* does not extend to the situation presented here, where the only issue is the criminality of the person thus immunized, and where the only intended use of the coerced disclosures is to obtain a remedy on behalf of government against the witness himself in consequence of any criminality thus disclosed. "Use" immunity, as applied to such a situation, would produce a contradiction of the philosophy of *Kastigar* in addition to a self-contradiction, and would destroy the self-incrimination provision of the Fifth Amendment in one of its most important applications.

Kastigar suggests, as previously noted, that information obtained under a grant of "use" immunity should be treated as though it were the product of a coerced confession. It is hard to imagine that this Court would tolerate the use of a coerced confession as prima facie proof of the facts there stated, whether the action were civil or criminal.

Spevack v. *Klein,* 385 U.S. 511 and *Garrity* v. *New Jersey,* 385 U.S. 493 (1967) have been properly construed as precluding an adjudication of default which is based upon a reasonable self-incrimination claim. *de Antonio* v. *Solomon,* 42 FRD 320, 322 (D. Mass. 1967). The same result was reached on a different rationale in *State* v. *District Court,* 426 P. 2d 431 (Wyo. 1967).

Petitioners were not merely defaulted, but also adjudged in contempt because they refused to provide evidence against themselves. That result is facially forbidden by the Fifth Amendment. The pretext for the contempt was that they had been offered "use" immunity. But that offer was qualified by the court's ruling that the coerced information could be used in the case at bar to prove that petitioners were felons. It is cold comfort to any witness thus stigmatized, that his testimony will not be used against him a second time.

Very obviously, the only legitimate purpose of depositions or other discovery procedure in a civil action is to provide evidence or leads to evidence *for use within that action.* It was the avowed purpose of the government to use coerced information in precisely that way. (R. 285-286)

We suggest that this is a totally unwarranted extension of the *Kastigar* doctrine. Immunity which does not preclude the use by the government of the coerced information against the person from whom it is coerced, for the purpose of obtaining an adjudication that the person "immunized" is a felon and imposing sanctions against him by reason of the coerced disclosures, is an unusual form of "immunity" indeed. It is not only no substitute for the Fifth Amendment protection; it is not even a reasonable substitute for the police interrogation room.

THE REASONABLE DOUBT STANDARD

Only four years ago, this Court stated:

> "(A) society that values the good name and freedom of every individual should not condemn a man for commission of a crime when there is a reasonable doubt about his guilt. * * * (C)ivil labels and good intentions do not themselves obviate the need for criminal due process safeguards . . ." *In re Winship* (1970) 397 U.S. 358, 364, 365.

That expression related to an adjudication of juvenile delinquency. Such adjudications are largely shielded from public scrutiny, and unavailable as character evidence once adult status is reached. But in *Winship,* your Honors made it clear that the significant constitutional criminal safeguards are available in any case in which the stigmatizing effect of the ultimate judgment might be comparable to that consequent upon a criminal conviction.

Incident to the adjudication of their status as felons (App. 25), petitioners were denied not only the reasonable doubt standard but every incident of the presumption of innocence. Not only was proof beyond reasonable doubt not required; proofs were dispensed with altogether. The petitioners were ordered to testify against themselves; and when they declined to do so, they were adjudged in default. (App. 20-22)

Inevitably, the Civil War against crime will produce many casualties, but we would hope that the *Winship* values could be rescued.

The Right Of Trial By Jury

We urge that your Honors confirm the fundamental right of a citizen to be branded judicially as a felon on the government's complaint, only in pursuance of the verdict of a jury of his peers.

The complaint did not seek penal servitude, but the claim for periodic reports over a period of ten years precludes any characterization of the matter as "petty", quite apart from the adjudication that Petitioners were guilty of a serious felony. Cf. *Cheff* v. *Schnackenberg,* 384 U.S. 373 (1966); *Bloom* v. *Illinois,* 391 U.S. 194 (1968).

The only relevant precedent is *United States* v. *Debs,* 64 F. 724 (C.C. Ill. 1894). In that case, the government sought to enjoin a direct, continuing and highly effective interference with interstate commerce.

The *Debs* complaint charged the defendant with obstruction of commerce through criminal acts. The defendant urged that he was entitled to trial by jury because of those allegations. The *Debs* court conceded that civil injunctive proceedings based upon criminal accusations would constitute an unconstitutional denial of trial by jury, unless "limited so as not to extend to a case which is not of equitable cognizance * * * (and) restricted to cases in which, in accordance with established precedent, an injunction could issue * * *" *United States* v. *Debs,* 64 F. 724, 753 (C.C. Ill. 1894).

On review in this Court, the question of trial by jury was not considered. Instead, this Court noted that the government was faced with an unprecedented emergency which quite literally prevented interstate commerce from moving at all. This Court held that in such a situation the government had the power to "brush away all obstructions to the freedom of interstate commerce or the transportation of the mails, using the Army of the nation, and all its militia . . ." *A fortiori,* as a lesser alternative, the government was permitted "to appeal in an orderly way to the courts for a judicial determination . . . to accomplish the same measure". *In re Debs,* 158 U.S. 564, 582 (1895). At the same time, this Court cautioned that equitable intervention to restrain criminal acts was limited to situations where there was "also a violation of property rights, and the party aggrieved has no other adequate remedy for the prevention of the irreparable injury . . ." 158 U.S. at 593.

The opinion below rests largely on *Debs.* But it is the bizarre fact that *Debs* is no more or less authority for the use of the Army to smash the petitioner's alleged gam-

bling operation, than to deny them trial by jury and other criminal procedural safeguards.

And that is as it should be. Both remedies are properly limited to specially urgent situations which demand unusual remedies.

Denial of Other Constitutional Rights

The government's claim of exemption from the requirement of confrontation, is manifest from its obtaining of a temporary restraining order *ex parte* predicated upon an agent's affidavit, and from the default judgment entered below. It would be a much lesser violation of the right of confrontation to introduce deposition evidence, whether or not a "civil" defendant could afford the travel costs and attorney's fees required for participation in the deposition.

The logic of the opinion below would necessarily compel the denial of yet other constitutional safeguards not directly drawn in issue on the facts of this case. For if all civil cases are alike, it must follow that by resort to Section 1964, the government may impress the status of adjudicated felon without appointment of counsel. And the use of illegally seized evidence can certainly be no more objectionable here, than in the use of evidence compelled through a self-contradictory grant of "use" immunity.

The proceeding below was quite literally a constitutional end run, circumventing every procedural safeguard which was encountered. Those not expressly denied by the opinion below, are only those not presented in the factual context of this case; and they must fall by its precedent.

II.

PETITIONERS ARE NOT WITHIN THE ENABLING STATUTE. THE STATUTE DOES NOT PROVIDE A REMEDY AGAINST GAMBLING AS SUCH, BUT ONLY AGAINST THE USE OF GAMBLING OR OTHER RACKETEERING TO INFILTRATE INTERSTATE BUSINESSES.

This action was brought under a statute which forbids:

1. Employment of "a pattern of racketeering activity . . . to acquire or maintain . . . any interest in or control of any enterprise which is engaged in . . . interstate . . . commerce." (18 U.S.C. 1962(b), App. 33-34)

and,

2. "(A)ny person . . . associated with any enterprise engaged in . . . interstate . . . commerce, to conduct . . . such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." (18 U.S.C. 1962(c), App. 34)

Those statutes were the only pleaded jurisdictional base of the action below. (App. 42, 43, 44)

Another section of the Act, 18 U.S.C. 1961 (App. 31) includes illegal gambling businesses within the definition of "racketeering activity" to which the quoted sections refer. But Sections 1962 and 1964 do not authorize an injunction to restrain racketeering activity as such. Instead, they authorize injunctive process only where the proceeds of racketeering or racketeering methods are used to infiltrate a business in interstate commerce.

The operation of an illegal gambling business—a form of "racketeering"—is punishable only by criminal sanctions. 18 U.S.C. 1955, App. 29-31.

Facially, therefore, no injunctive intervention is authorized against petitioners, since they are not alleged to have infiltrated anything at all. It required considerable ingenuity to bring petitioners within Sections 1962 and 1964, but the prosecution was apparently equal to the task.

The theory of the action below was that since the defendants had conducted a gambling business, they had maintained and operated a business—gambling—by racketeering activity: gambling. Thus, their business was considered to violate not only 18 U.S.C. 1955, which prohibits gambling "businesses" (App. 29-31) but Section 1962 as well, which prohibits the use of all racketeering, including gambling, as a means of operating a business—any business, in the government's view, including a gambling business.

In short: it was the theory of the action below that every violation of Section 1955 is *per se* a violation of Section 1962.

That theory was accepted in the court below through reference to a Senate report which shows that the Senate intended to prohibit gambling as such (App. 10)

The Court of Appeals is completely mistaken in its reference.

Congress did indeed intend to adopt a statute prohibiting gambling businesses as such, and the Senate report does indeed contain the quoted language in support of that statute. But that statute is Section 1955, *not* Section 1962. Congress provided for the suppression of gambling by criminal prosecution only and not by civil injunction.

The language quoted by the Court of Appeals is the Senate Committee's discussion of Title VIII of the Organized Crime Control Act of 1970. That title includes

Section 1955, which clearly and facially prohibits gambling businesses, but provides only criminal penalties on violation.

But the quoted language has no relevance whatever to Title IX of the Act, which authorizes civil injunction.

Reference to the same report cited by the Court of Appeals shows that the civil injunction proceeding "has as its purpose the elimination of the infiltration of organized crime and racketeering into legitimate organizations operating in interstate commerce". Senate Report 91-617 p. 76 (1969)

The House Report also states that the statute on which the government here relies is "aimed at stopping the infiltration of racketeers into legitimate organizations". House Report 91-1549, 1970 U. S. Code Cong. and Admin. News, Vol. 2 p. 4033.

Both by its terms and its history, the injunctive remedy was *not* directed against gambling "businesses"; it was intended to prevent the use of the proceeds of crime, and the emloyment of criminal methods in the infiltration of legitimate business.

The allegations of the complaint below do not even suggest any infiltration or other acquisition by any petitioner of anything at all. It is merely alleged that they control their gambling business by gambling, and thus violated not only Section 1955 but Section 1962 as well.

It is not necessary to decide, within the framework of this case, whether the infiltrated or controlled enterprise must be a legitimate one. For example, a criminal may acquire an interstate prostitution "business" by extortion. The reach of the statute in such a situation is outside the scope of this case.

But by the government's interpretation of the statute, a gambler operates his gambling business by gambling. He may be civilly enjoined, not because of his gambling business, but because he resorts to gambling in conducting that business.

That argument is completely unsupportable. Had Congress intended to authorize an injunction against gambling as such, that body is hardly so lacking in fluency as to be forced to the ridiculous circumlocution imputed to it in this case. The same argument is equally supportable as applied to arson, robbery, theft and kidnapping, all of which are encompassed within 18 U.S.C. 1961. (App. 18-19). The best evidence that Congress did not intend to authorize an injunction restraining all criminal activity as such is that it has not done so.

The injunction statute is clearly aimed at, and its application facially limited to those who infiltrate an interstate business with racketeering money or racketeering methods. It clearly excludes "racketeering" unaccompanied by infiltration. (18 U.S.C. 1962, App. 33) It would reach the criminal who uses the proceeds of gambling activity to acquire a food distributorship. It would also reach the person who employs extortion in the operation of a food distributorship in order to suppress competition or influence potential customers. But it does not reach the man who does nothing other than gamble, regardless of the scale on which he might do so.

There is no semblance of a statutory cause of action here. To apply the statute in this case, is to enforce a statute drastically different from that which was written by Congress, in a situation in which there is no reason to believe that Congress would have authorized a procedural departure of such magnitude.

III.

THE ACT SHOULD BE CONSTRUED AS REQUIRING A SHOWING OF SPECIAL CIRCUMSTANCES, BEYOND A SIMPLE CRIMINAL VIOLATION, AS A CONDITION OF EQUITABLE INTERVENTION.

Many of the constitutional problems presented by this case result from the interpretation placed on the statutes considered in the court below, rather than from the express provisions of those statutes.

We urge the adoption of an interpretation which would limit injunctive relief to situations presenting immediate threats to a definable segment of interstate commerce, or in which the defendant has previously been convicted criminally of the offense sought to be enjoined. We think it demonstrable that any other approach raises serious problems of statutory vagueness, and tends to aggravate the denials of constitutional privilege referred to in earlier portions of this petition.

We further suggest that the approach adopted below will result in an intolerable burden on the judiciary, and will relegate the federal courts to a new and unpalatable role.

All of these difficulties can be ameliorated, and some of them can be completely solved by the rejection of the statutory interpretation adopted below. Both constitutional and practical supervisory considerations dictate the adoption of an interpretation which will limit equitable relief to cases of special equitable interest, rather than making such relief available routinely as a remedy for every situation involving a statutory violation.

The Problem of Vagueness.

18 U.S.C. § 1964 grants to the district courts "jurisdiction to prevent and restrain violations of Section 1962 . . ." (App. 35).

Section 1962 denounces a special crime, punishable by twenty years' imprisonment.

Reference to that statute will disclose with considerable clarity the facts which must be found in order to energize the penal provisions of Section 1962.

But there is nothing to indicate what facts must exist in order to warrant an injunction under Section 1964.

Thus, every citizen is alerted to the conduct which he must avoid in order to preclude his incarceration under Section 1962. But there is nothing to advise him what he must do or refrain from doing if he would avoid injunction, divestiture, a ten-year reporting requirement, restriction on his future investments, and such other relief as ingenuity may devise under the provisions of Section 1964.

> "(A) statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." *Connally* v. *General Construction Company* (1926), 269 U.S. 385, 391.

The statute is unconstitutionally vague as written, because nobody can know whether he falls within the group to whom the government may say, with statutory propriety: "Nobody may violate Section 1962, but especially not you."

Do we incur this liability upon conviction of an offense under 1962? That would appear logical, but the judgment below makes it clear that no such conviction is required.

In the prosecution's view, the statute is designed for "situations which are not susceptible to proof of a criminal violation" (R. 185).

Are we then liable if we have committed such an offense but have avoided criminal accountability? The opinion below would imply exactly that. But if that is the case, *every* suspected murderer, robber, arsonist, transporter of stolen property, and perpetrator of a lengthy list of other offenses is equally liable to such equitable intervention in his affairs. The implications of that approach in terms of judicial burdens is startling enough in itself. But even beyond that: How, in the absence of prior conviction or proof beyond reasonable doubt, may government properly say that a citizen has committed a felony? And in any event, the traditional test of the availability of injunctive process is not a wrongful act, but the necessity for intervention to prevent future wrongs.

Shall we, then, adopt the traditional equitable approach, and read its provisions into the statute? In the view of the court below, Yes and No, as necessary to approve equitable intervention. The statute was upheld as not unconstitutionally vague, because general equitable principles were implied as a part of the Act (App. 9). Every violator, however, will be enjoined routinely, without any necessity for the traditional showing of special circumstance, impact on commerce, irreparable injury, or inadequacy of other remedies (App. 10). And the opinion makes it clear that a past violation is only one method of showing the likelihood of future wrongs (App. 9).

The facial scope of the challenged statute is such that the district court is authorized, inter alia, to issue "appropriate orders, including but not limited to: ordering any person to divest himself of any interest, direct or in-

direct, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person . . . or ordering dissolution or reorganization of any enterprise . . ." (18 U.S.C. 1964, App. 35-36)

No citizen could possibly predict whether he will fall into the class of "any person" impacted by the statute; whether his "enterprise" is one that may be dissolved under its provisions; and what might be the judicial consequences of such a proceeding.

The Burden to the Judiciary.

The opinion below contemplates a fundamental revision of the role of the judiciary in general, and the federal judiciary in particular. Such revision is merely part of a broader metamorphosis which includes a change in the basic theory of criminal accountability. But it is worthy of mention in itself.

The new role will be one which combines the functions of general license bureau, desk sergeant and parole board. As thus visualized the courts will respond to the prosecutor's every signal until commerce—and, indeed, the entire spectrum of interpersonal relationships—will have been purged of every minute trace of impurity. Toward that end, the courts will employ the complete equitable arsenal, from injunction to reorganization.

No special circumstance need be shown. It is enough that the prosecutor alleges that a law has been violated. The scope, impact and implications of that violation are considered irrelevant. One telephone in a billiard parlor may seem somewhat minuscule; but no case is too small. The wages of sin is federal equitable process.

Both formally and informally, this Court has expressed its unwillingness "to flood the federal courts with a multi-

tude of prosecutions for relatively minor acts . . . considered as more appropriately the business of the States." *United States* v. *Maze*, 94 S. Ct. at 652, 38 L Ed 2d at 234 (dissent of the Chief Justice). Other expressions dealing with the need to avoid sensitive federal-state relationships and the danger of committing federal police and judicial resources to the solutions of essentially local problems include *United States* v. *Enmons*, 410 U.S. 396 (1973); *United States* v. *Bass*, 404 U.S. 336, 339, 347-50 (1971); *Rewis* v. *United States*, 401 U.S. 808, 811 (1971); Cf. two publications by the Chief Justice: *Has the Time Come?*, 55 F.R.D. 119, 120-21, and *The State of the Judiciary—1970*, 56 A.B.A.J. 929.

There is a ready solution to this problem, in the aspect of enforcement of Section 1964. With the indulgence of the Court, we would suggest that it lies in limiting the application of that statute to situations which present immediate and irreparable injury to a definable segment of interstate commerce.

A Special Allegation of Irreparable Injury Or Other Unusual Circumstance Should Be Required When Government Seeks An Injunction To Restrain Criminal Activity.

The view expressed and accepted in the court below was that any gambling business necessary "results in the diversion of money and goods from legitimate enterprises into illegal and illegitimate channels" (App. 41) Accordingly, it was contended that all such activity should be restrained on the government's demand.

But that is simply a restatement of the philosophic base of federal jurisdiction over gambling. It is in no sense an allegation of grounds for injunction, unless it be con-

sidered that *all* statutory violations must be enjoined on the prosecutor's demand.

There are only two choices for this or any Court:

1. To accept the government's view that all crime may be enjoined civilly, without any showing of special circumstance; or

2. To limit the availability of injunctive process to situations involving special and unusual grounds for equitable intervention.

The court below expressly adopts the first position (App. 10-11). The implications of that choice in terms of judicial management are obviously undesirable. But the constitutional implications of that election are no less significant.

Statutes somewhat similar to those here considered have existed for decades without challenge in the area of trade regulation. Those statutes are relied upon as the ultimate base of the opinion below. Since they address themselves to regulatory matters rather than felonies, one might expect that they would be more likely than the statute considered here to receive a broad application.

However, the exact converse is true. Conduct apparently well within the statutory language is not actionable under the regulatory statutes unless it "directly and materially affect(s) the commerce of the United States." *U. S.* v. *Aluminum Company of America,* 44 F. Supp. 97, 215 (D.C.N.Y. 1941), trf'd 322 U.S. 716, rev'd on different grounds but upheld in this aspect 148 F. 2d 416. *Apex Hosiery* v. *Leader,* 310 U.S. 469, 496 (1940). In a civil anti-trust proceeding, the remedy may not go beyond what is necessary to assure unfettered competition. *United States* v. *National Lead Co.,* 322 U.S. 319, 338. A criminal violation provides no basis for civil liability unless that

violation has caused damage. *Keogh* v. *Chicago & N.W. R. Co.*, 260 U.S. 156, 162 (1922).

Equitable proceedings are frequently employed to restrain activities which may be defined as criminal. The criminality in such cases, however, is collateral; equity acts because of the property rights involved. *State* v. *Red Owl Stores, Inc.*, 253 Minn. 236, 92 N.W.2d 103, 110-112 (1958); *People* v. *Laman*, 277 N.Y. 368, 14 N.E.2d 439, 444-446 (1938). Thus, the operation of a house of prostitution may be enjoined civilly if it is shown to obtrude to the point of becoming a public nuisance, but not if it is conducted unobtrusively so that rights of third parties are not affected. Yet, both circumstances present equally actionable misconduct in terms of vulnerability to criminal prosecution.

The application of that same standard to civil actions under 18 U.S.C. 1964 is constitutionally mandated. To grant the government an equitable remedy against crime constitutes the denial of trial by jury unless "limited so as not to extend to a case which is not of equitable cognizance • • • (and) restricted to cases in which, in accordance with established precedent, an injunction could issue • • •" *United States* v. *Debs*, 64 F. 724, 753 (C.C. Ill. 1894), aff'd 158 U.S. 564.

On review, this Court affirmed the use of injunctive process on the specially emergent facts of the *Debs* case, holding that criminal acts might be civilly restrained if those acts were "also a violation of property rights, and the party aggrieved has no other adequate remedy for the prevention of the irreparable injury." *In re Debs*, 158 U.S. 564, 593 (1895). Although the opinion below relies heavily upon that decision, its ultimate lesson was not considered.

One whose conduct constitutes a special impediment to the flow of commerce, has no legitimate complaint if he,

like anyone else in the same position, is enjoined through classic equitable proceedings. The criminality of his acts will give him no special immunity. But one who is alleged to have done nothing more than violate a criminal statute, with no special impact on property rights or blockage of commerce, is entitled to have his culpability determined by a jury. That right should not be subverted through the device of an equity proceeding.

The interpretation adopted below creates not only a burden on the judiciary, but a gratuitous violation of the right to jury trial.

In every other type of case, equitable relief is granted only to prevent irreparable injury, on a showing of special circumstances which render the legal remedy inadequate. *White* v. *Sparkill Realty Corp.*, 280 U.S. 500, 512 (1930); *Matthews* v. *Handley*, 179 F. Supp. 470, 471 (D.C. Ind. 3-judge 1959), aff'd 361 U.S. 127.

It should not be assumed lightly that Congress, in authorizing an injunctive remedy, intended to eliminate this historic and necessary condition precedent to all injunctive process. In enacting an enabling statute similar to that provided in anti-trust cases, Congress must be presumed to have adopted the same construction which the courts have consistently applied in such cases.

IV.

TITLE 18 U.S.C. SEC. 1955 CONSTITUTES AN UNCONSTITUTIONAL EXTENSION OF THE COMMERCE CLAUSE AND A VIOLATION OF THE TENTH AMENDMENT.

18 U.S.C. 1955 (A. 29-31) denominates as a federal offense whose interstate impact is presumed, all gambling involving five or more persons and extending to a gross of $2,000 on any given day.

Petitioners were not directly charged under Section 1955. However, the predicate charge against them was violation of that Section. The complaint charged a violation of Section 1962, which forbids the investment of "racketeering" proceeds or the use of "racketeering" in an interstate business. "Racketeering", in turn, is defined in Section 1961, which provides that violation of any of the statutes there listed, including Section 1955, constitutes "racketeering".

In *Perez* v. *United States,* 402 U.S. 146 (1971) your Honors held that Congress had appropriately found that "loan sharks" constituted a class whose activities affected interstate commerce. Accordingly, this Court validated a federal statute which punished all such activities, without the necessity for showing an interstate involvement in any given case.

As the *Perez* opinion notes, Congress had found that the loan shark "launders" illegally acquired money by funneling it into channels of legitimate trade. *Perez,* 402 U.S. at 149-150. Rationally, loan sharking is likely to reflect interstate crime and affect interstate commerce.

The present statute constitutes reduction of the *Perez* doctrine to its ultimate absurdity. This Court has aptly observed that all rights tend "to declare themselves absolute to their logical extreme". *Ross* v. *Moffitt,* 41 L.Ed. 341, 352 (1974). The rights of government itself are in no sense exempt from that tendency.

Section 1955 was recently held constitutional by the Court of Appeals for the Ninth Circuit in *United States* v. *Sacco,* 491 F.2d 995. The *Sacco* opinion was accompanied by an extensive dissent (491 F.2d at 1004) analyzing the history and infirmities of that statute.

The majority and dissent in *Sacco* demonstrate vividly the mammoth difference betwen Section 1955 and the statute considered in *Perez.*

The statute considered in *Perez* denounced all extortionate loan sharking, regardless of the amount involved. That prohibition was consistent with a statutory determination that loan sharking was peculiarly a crime of interstate organizations.

Unlawful gambling, on the other hand, is "an offense found in every hamlet in the nation". *Sacco,* dissent, 491 F.2d at 1014.

Accordingly, Section 1955 makes no attempt to claim federal jurisdiction over all gambling. Instead, it prescribes certain levels—involvement of five people and a gross of $2,000 in any one day—to delineate the "class" against whom the statute is directed.

Perez teaches that the test of such a statute is whether there is a rational basis for the delineation of the "class of activities" deemed to fall within interstate commerce. 402 U.S. at 153. *Perez* adopts the "class of activities" test employed in *Heart of Atlanta Motel* v. *United States,* 379 U.S. 241, 252-253 and *Katzenbach* v. *McClung,* 379 U.S. 294, 300-301.

But Congress' view of gambling is quite different from its view of loan sharking. The interstate presumption is applied only to gambling *above the statutory level.* The existence, therefore, of a "rational basis" for the delineation of the "class of activities" denounced by Section 1955, is simply not answered by determining whether *all* gambling affects interstate commerce. Congress decided that it did not. The "class" necessarily determines the "test";

and the test is, accordingly, whether there is a rational basis for saying that all gambling involving more than five people or a gross of more than $2,000 in any one day, affects interstate commerce.

We have already alluded to the detailed and rational findings by Congress in the enactment of the statute validated in *Perez,* 402 U.S. at 149-150.

Contrast the statute at bar. As conceded by both the majority and the minority in the recent Ninth Circuit *Sacco* opinion, the criterion of Section 1955—a gross of $2,000 on any given day—was established because of the fact that a specific showing of interstate activity was generally impossible, and because experience had shown that in previous gambling raids the agents had been able "to come up with better than $2,000 a day in most all of the cases". 491 F.2d at 1000, fn 13 (majority); *Id.* at 1016 (dissent). Thus, it seems clear that the only "rational basis" for the definition of the "class of activities" proscribed by Section 1955, is that if that statute were drafted differently, it would be difficult to obtain a conviction.

A presumption which is rational as to heroin is not necessarily rational when applied to marijuana. *Leary* v. *United States,* 395 U.S. 6 (1969). With equal force, a presumption which is rational as to extortionate loan sharking is not necessarily rational as applied to gambling above an arbitrarily delimited level. A gambling operation which grosses $1900 on a given day is no more and no less likely to have an interstate character than is one which grosses $2100 on that day. Under the statute, if the gross volume of the latter operation decreases by $200 a day, it is deemed nonetheless to retain its interstate character; on the other

hand, the $1900-a-day operation is considered to lose its purely local flavor, and to acquire a lifelong interstate implication, if its gross volume increases by $100 on any single day.

Section 1955 depends, for its interstate nexus, upon conjecture, slogans, and the notion that all crime beyond the misdemeanor level must be federally actionable in the name of efficiency.

Our prayer to this Court has already been voiced with some eloquence:

> "Surely we have arrived at a point when the federal courts should have the courage to say to the Congress, 'this far, and no farther!'" *U. S.* v. *Sacco,* 491 F.2d 995, 1017 (9 Cir., 1974, dissenting opinion)

Respectfully submitted,

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In the
Supreme Court of the United States

OCTOBER TERM, 1974

No.

LEONARD L. CAPPETTO, STANLEY J. MIKOLAJCZAK, JOSEPH A. CORABI, THOMAS J. WILSON, JOSEPH I. MANTIA, GEORGE J. MUSTEIKAS and NICHOLAS J. PIDONE,

Petitioners,

VS.

UNITED STATES OF AMERICA,

Respondent.

APPENDIX TO PETITION FOR CERTIORARI

APPENDIX A

Opinion of the Court of Appeals for the Seventh Circuit

Before STEVENS, SPRECHER and TONE, *Circuit Judges.*

TONE, *Circuit Judge.* The constitutionality of the civil remedies provision of the Organized Crime Control Act of 1970 (18 U.S.C. § 1964) is challenged in this appeal from an order granting a preliminary injunction against further gambling activities, a related default order, and a contempt order.

The provisions of the Act pertinent here provide as follows: Section 1955 of Title 18 makes it an offense to participate in an illegal gambling business, which is defined as a gambling business violative of state law involving five or more participants that remains in substantially continuous operation for over 30 days or has a gross revenue of $2,000 in any one day. Section 1961 defines "racketeering activity" to include, *inter alia,* any act indictable under Section 1955 and "pattern of racketeering activity" to mean at least two acts of racketeering activity, with qualifications not germane here. Section 1962, in subsection (b), makes it unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or whose activities affect, interstate or foreign commerce. Subsection (c) of that section makes it unlawful for any person employed by or associated with such an enterprise to participate in

the conduct of the enterprise's affairs through a pattern of racketeering activity or collection of an unlawful debt. Subsection (d) makes it unlawful to conspire to violate any of the other subsections of Section 1962. Section 1963, which is not invoked by the government in this case, prescribes criminal penalties for violation of Section 1962. Finally, Section 1964, under which this action is brought, gives the District Courts of the United States "jurisdiction to prevent and restrain violations of section 1962," and lists by way of illustration several types of equitable relief that may be granted.

The Act thus gives the government both civil and criminal remedies for the enforcement of Section 1962. In this case the government elected to use its civil remedy.

The complaint alleges the following facts: On various occasions from October 26, 1973 to the date of the filing of the complaint, defendants Joseph A. Corabi, Stanley J. Mikolajczak, and Thomas J. Wilson used a building known as Western Avenue Billiards in Chicago and the telephone located there to receive horse race and sports wagers and to transmit wagering information. This activity took place with the knowledge of the owner, defendant Leonard L. Cappetto. Defendants Joseph I. Mantia, George J. Musteikas, and Nicholas J. Pidone, and others known to the government only by nickname, placed wagers with defendants Corabi, Mikolajczak, and Wilson for persons other than themselves. On various occasions another person known to the plaintiff only as "Joe" received wagers from, and gave wagering information to defendant Corabi. Defendant Pidone also allowed his residence to be used for the gambling operation. These activities are alleged to constitute an illegal gambling business having a gross revenue of over $2,000 on a single day and involving

five or more persons in violation of Illinois law and Section 1955 which has diverted money and goods from legitimate enterprises into illegal channels.

In Count I of the complaint, which is laid under Section 1962(b), it is alleged that, through a pattern of racketeering activity consisting of participating on two or more occasions in an illegal gambling business violative of Section 1955, or through collection of an unlawful debt, the defendants acquired or maintained interests in or control of an enterprise, *viz.*, an illegal gambling business proscribed by Section 1955, which was engaged in, or the activities of which affected, interstate commerce. In Count II it is alleged that the defendants violated Section 1962(c) by conducting the enterprise's affairs through a pattern of racketeering activity. In Count III it is alleged that the defendants violated Section 1962(d) by conspiring to do the acts charged in Counts I and II. Jurisdiction is alleged under Section 1964 and also under the general jurisdictional grant of 28 U.S.C. § 1345.

In addition to preliminary and permanent injunctions restraining the defendants and those acting in concert with them from engaging in the illegal gambling operation, the government seeks divestiture by defendant Cappetto of his interest in the building; disclosure of the identities of those persons acting in concert with defendants in the gambling business complained of, including those known to the government only by nickname; an order directing each of the defendants to submit to the United States Attorney for a period of ten years sworn quarterly reports stating his current address, business, sources of income and other information bearing on his compliance with the injunction the court is asked to enter; and such further relief as the court deems just.

After the entry of a preliminary restraining order without notice, the propriety of which is not before us, the District Court denied a motion to dismiss the complaint and entered various discovery orders, including an order granting defendant Corabi "use" immunity under 18 U.S.C. §§ 6002 and 6003. Defendants, relying on the Fifth Amendment, refused to comply with the discovery orders and refused even to appear for depositions and be sworn. The District Court then entered the three orders from which this appeal is taken. The first order provided that, by reason of defendants' refusal to obey the discovery orders, the material allegations of the complaint were taken as true, the defendants were adjudged in default, and default judgment was entered against them. In the second order the court preliminarily enjoined the defendants from carrying on the gambling activities described in the complaint. In the third order the court also held defendants in contempt and ordered them committed until they obeyed the discovery orders. The execution of the latter order has been stayed pending appeal.

Defendants' principal argument is that this action under Section 1964 is essentially a criminal proceeding, and therefore they are entitled to the rights guaranteed by the Constitution to defendants in criminal cases. They also argue that Section 1964 is unconstitutionally vague. In addition, they argue that Congress lacks authority under the commerce clause of the Constitution (Article I, Section 8, Clause 3) to prohibit gambling, and that Section 1964, and Section 1955 as well, are unconstitutional for that additional reason.

The latter argument need not detain us long. The power of Congress to prohibit activities made unlawful by state law which take place in, or affect, interstate commerce has long been settled. *Caminetti* v. *United States*, 242 U.S.

470 (1917); *Wickara* v. *Filburn*, 317 U.S. 111 (1942). The Supreme Court has upheld the federal loanshark statute (18 U.S.C. § 891) against a challenge similar to the one made by defendants here. *Perez* v. *United States*, 402 U.S. 146 (1971). This court and other courts of appeals have held that Section 1955 is authorized by the commerce clause. *United States* v. *Hunter*, 478 F. 2d 1019, 1020-1021 (7th Cir. 1973), *cert. denied*, 414 U.S. 857 (1973); *United States* v. *Becker*, 461 F. 2d 230, 233-234 (2d Cir. 1972); *United States* v. *Riehl*, 460 F. 2d 454, 458 (3rd Cir. 1972); *United States* v. *Ceraso*, 467 F. 2d 653, 657-658 (3rd Cir. 1972); *United States* v. *Harris*, 460 F. 2d 1041, 1043-1049 (5th Cir. 1972), *cert. denied*, 409 U.S. 877 (1972); *Schneider* v. *United States*, 459 F. 2d 540, 541-542 (8th Cir. 1972), *cert. denied*, 409 U.S. 877 (1972); *United States* v. *Sacco*, 491 F. 2d 995, 999-1001 (9th Cir. 1974). These cases demonstrate that Congress had power to determine that the class of activities described in Section 1955 adversely affects interstate commerce and, based upon that finding, to prohibit those activities. It is also settled, on the authority of *Perez*, that the statute is valid "even when applied to individual members of the class whose own activities may not have any demonstrable impact on interstate commerce." *United States* v. *Hunter*, *supra*, 478 F. 2d at 1021. See also *Schneider* v. *United States*, *supra*, 459 F. 2d at 541; and *United States* v. *Becker*, *supra*, 461 F. 2d at 233-234.

Congress also has power to provide for civil injunctive relief against activities which adversely affect interstate commerce, and that power extends to activities which are made criminal by state or federal law. Long ago the Supreme Court, in the case of *In re Debs*, 158 U.S. 564 (1895), held that the commerce clause authorizes the federal government, through injunctive relief granted by its

courts, to restrain or remove obstructions to interstate commerce, stating:

> ". . . the jurisdiction of courts to interfere in such matters by injunction is one recognized from ancient times and by indubitable authority; . . . such jurisdiction is not ousted by the fact that the obstructions are accompanied by or consist of acts in themselves violations of the criminal law; . . . the proceeding by injunction is of a civil character, and may be enforced by proceedings in contempt; . . . such proceedings are not in execution of the criminal laws of the land. . . ." 158 U.S. at 599.

Although the Court in the *Debs* case appears to rest its decision on broader grounds, the injunction in that case was issued (*United States* v. *Debs*, 64 F. 724, 745 (C.C. N.D. Ill. 1894)) under the Sherman Act of 1890, 15 U.S.C. § 1, *et seq.*, in which Congress made violations of the prohibitions against restraints of trade and monopolizing actionable in both criminal and civil proceedings. Referring to the equitable action authorized by that statute, the Court said in *United States* v. *Trans-Missouri Freight Association*, 166 U.S. 290, 343 (1897):

> "Congress having the control of interstate commerce, has also the duty of protecting it, and it is entirely competent for that body to give the remedy by injunction as more efficient than any other civil remedy."

In the exercise of its authority to regulate commerce, Congress has also provided civil actions for injunction as alternatives to criminal actions in the Federal Food, Drug and Cosmetic Act, 21 U.S.C. §§ 321-334, the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. § 135, *et seq.*, and the Meat Inspection Act, 21 U.S.C. §§ 674-676. Acting under other constitutional grants of authority, Congress has provided alternative civil and criminal remedies in the Internal Revenue Code, 26 U.S.C. §§ 7201, 7231,

7402; and the three emergency price control acts, the Emergency Price Control Act of 1942, 56 Stat. 26, the Defense Production Act of 1950, 50 App. U.S.C. § 2109, and the Economic Stabilization Act of 1970, 12 U.S.C.A. § 1904 note. Nothing in the Constitution prevents Congress from providing for both civil and criminal enforcement of a statute.

It has thus been settled since the *Debs* decision that acts which may be prohibited by Congress may be made the subject of both criminal and civil proceedings, and the prosecuting arm of the government may be authorized to elect whether to bring a civil or criminal action, or both. A civil proceeding to enjoin those acts is not rendered criminal in character by the fact that the acts also are punishable as crimes.

Defendants unsuccessfully attempt to distinguish what they refer to as "the federal anti-trust, pure food, and similar statutes." They argue that the civil proceedings provided for in those statutes, unlike those under Section 1964, are not designed as alternatives to criminal prosecution to serve when the requisite proofs are lacking. Neither, necessarily, is a proceeding under Section 1964, but the standard of proof is lower in a civil proceeding than it is in a criminal proceeding under any of the statutes we are considering. Defendants argue that the other statutes were designed to serve values "totally different from the purely criminal thrust of the Organized Crime Control Act." We see no basis in this distinction, if it is one, for circumscribing Congress' power to regulate activities affecting interstate commerce. Conduct adversely affecting interstate commerce which is of a kind that is traditionally proscribed under criminal statutes, state or federal, does not enjoy a special immunity from regulation through civil proceedings, as the Supreme Court pointed out in the *Debs* case.

This is not a case in which the procedure "though technically a civil proceeding, is in substance and effect a criminal one," as was *Boyd* v. *United States*, 116 U.S. 616, 634 (1886), on which defendants rely heavily. *Boyd* was expressly distinguished in *Debs, supra* (158 U.S. at 594), a decision which defendants do not see fit to mention in their main brief. Similarly *In re Gault*, 387 U.S. 1 (1967) and *In re Winship*, 397 U.S. 358 (1970), relied upon by defendants, involved juvenile proceedings which were civil in name but in which sanctions of a criminal nature were imposed. *One 1958 Plymouth Sedan* v. *Pennsylvania*, 380 U.S. 693, 696-698 (1965) and *United States* v. *U.S. Coin & Currency Co.*, 401 U.S. 715 (1971), also relied upon by defendants, involved forfeitures. No forfeiture is provided for in Section 1964 or sought by the government in this proceeding.

Section 1964 provides for a civil action in which only equitable relief can be granted. The relief authorized by that section is remedial not punitive and is of a type traditionally granted by courts of equity. It is the same kind of equitable relief that federal courts have been granting for generations in civil actions under Section 4 of the Sherman Act and Section 15 of the Clayton Act, 15 U.S.C. §§ 4 and 25.

The argument that Section 1964 is unconstitutionally vague is also without merit. That section, like Section 4 of the Sherman Act, is merely a specific grant of jurisdiction to enforce the substantive provisions of the statute by injunction. The kinds of activity to which the injunction may be addressed are described with sufficient particularity in those substantive provisions, Section 1955 and Section 1962. Defendants do not argue that either of these sections is unconstitutionally vague. Nor do they question that the alleged gambling activities are covered by Section 1955.

They do challenge the applicability of Section 1962, but we construe that section below to apply to their enterprise.

The conditions under which an injunction will be issued pursuant to Section 1964 are determinable from the principles that govern the granting of equitable relief. See *Appalachian Coals, Inc.* v. *United States,* 288 U.S. 344, 377-378 (1933); *Hecht Co.* v. *Bowles,* 321 U.S. 321, 327-331 (1944); *United States* v. *W. T. Grant Co.,* 345 U.S. 629, 632-633 (1953); *Walling* v. *T. Buettner & Co.,* 133 F. 2d 306, 308 (7th Cir. 1943); *Bowles* v. *Lentin,* 151 F. 2d 615, 620 (7th Cir. 1945). Whether equitable relief is appropriate depends, as it does in other cases in equity, on whether a preponderance of the evidence shows a likelihood that the defendants will commit wrongful acts in the future, a likelihood which is frequently established by inferences drawn from past conduct.

Section 1964 is a valid exercise of Congress' authority to regulate commerce. We turn now to the other arguments advanced by the defendants.

Defendants contend that the Act does not authorize the action brought by the government here, because Congress' purpose was to protect "legitimate business" against infiltration by racketeers and not to prohibit racketeering itself. Both the statutory language and the legislative history, however, support the government's contrary interpretation of the Act. While one of Congress' targets was "the infiltration of legitimate organizations by organized crime" (Sen. Rep. 91-617, p. 80 (1969)), and subsection (a) of Section 1962 is aimed at that target, Congress also intended to prohibit any pattern of racketeering activity in or affecting commerce; and subsections (b) and (c) of Section 1962 specifically prohibit such activity. Subsection (b) forbids acquiring or maintaining

an interest in an enterprise which affects commerce through a pattern of racketeering activity or through collection of an unlawful debt; and subsection (c) forbids participation in the affairs of such an enterprise through those means. That Congress intended to give the term "enterprise" a very broad meaning is recognized in a recent Second Circuit case. *United States* v. *Parness*, No. 74-1027 (Slip Opinion, p. 4443) (2nd Cir., June 27, 1974). There is nothing in the language of subsection (b) or (c) or in the definition section of the Act, Section 1961, to suggest that the enterprise must be a legitimate one. Congress' intention to include an illegal gambling business in the categories of "racketeering activity" and "enterprise" appears not only from the language of the statute but from the Senate Committee Report:

> "Despite the best efforts made to date by both the Federal and the several State governments, gambling continues to exist on a large scale to the benefit of organized crime and the detriment of the American people. A more effective effort must be mounted to eliminate illegal gambling. In that effort the Federal Government must be able not only to deny the use and facilities of interstate commerce to the day-to-day operations of illegal gamblers—as it can do under existing statutes—but also to prohibit directly substantial business enterprises of gambling . . ." Sen. Report 91-617, pp. 72, 73 (1969).

Defendants also argue that the government has not shown irreparable injury or inadequacy of the remedy at law. We need not decide the academic question of whether, in the absence of Section 1964, such a showing would be necessary. It was plainly the intention of Congress in adopting Section 1964 to provide for injunctive relief against violations of Section 1962 without any requirement of a showing of irreparable injury other than that injury to the public which Congress found to be inherent in the conduct made unlawful by Section 1962.

It is also obvious that Congress did not intend to require a showing of inadequacy of the remedy at law. If, as defendants contend, the existence of the criminal remedy at law under Section 1963 would defeat an action in equity under Section 1964, the latter section would be a nullity.

The defendants challenge the government's requests for divestiture and for a requirement that the defendants file quarterly reports for ten years. Divestiture has been a favored remedy for antitrust violations since *Standard Oil Co.* v. *United States*, 221 U.S. 1, 77-78 (1910). *United States* v. *Grinnell Corp.*, 384 U.S. 563, 580 (1966). Challenges to that form of relief as punitive have been unsuccessful. *E.g., United States* v. *Crescent Amusement Co.*, 363 U.S. 173, 189 (1944). See also *United States* v. *E. I. duPont de Nemours & Co.*, 366 U.S. 321, 326-327 (1961). Requiring a corporate defendant to file reports is a form of relief "commonly granted for the purpose of determining whether a defendant has complied with an antitrust decree." *United States* v. *Grinnell Corp.*, 384 U.S. 563, 579 (1966), but, when the defendant is an individual, Fifth Amendment rights come into play. Cf. *United States* v. *Bausch & Lomb Co.*, 321 U.S. 707, 726-728 (1944). It is premature to consider whether divestiture or a reporting requirement in any form would be appropriate in this case, because the District Court has not yet ruled on the requests for these kinds of relief. The preliminary injunction order merely enjoins further gambling activities *pendente lite*, relief clearly civil in nature and within the power of the District Court to grant in this action.

Defendants' attack on the District Court's contempt order and default order falls with their challenge to the complaint on its merits. Since this was a civil proceeding, plaintiff was entitled to discovery as in any other civil

case, and the court had the authority granted by the Federal Rules of Civil Procedure to enter appropriate discovery orders and to enforce those orders. Defendants have no more right to refuse to be sworn or to refuse to submit to questioning than any other party in a civil case. A defendant of course has the right under the Fifth Amendment to refuse to answer a specific question on the ground that the answer may tend to incriminate him. This right disappears, however, if use immunity is granted under 18 U.S.C. §§ 6002 and 6003, as it was to defendant Corabi. The immunity granted is coextensive with the privilege against self-incrimination, *Kastigar* v. *United States*, 406 U.S. 441, 461 (1972), and therefore may be invoked only against criminal proceedings. Accordingly, testimony given by a party in a civil case under a grant of immunity may be used against that party in that case, although it cannot be used in any criminal proceeding against him. When Corabi refused to testify despite the grant of immunity, and when the other defendants refused to obey the court's order to appear for depositions, they were in contempt and subject to sanctions under Rule 37, F. R. Civ. P. The District Court had authority to declare them in default and to grant interlocutory relief on the basis of that default and also had authority to hold them in contempt and to order them committed until they purged themselves of the contempts.

The orders appealed from are affirmed.

AFFIRMED.

A true Copy:
Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX B

Order Denying Rehearing in the Court of Appeals

October 1, 1974

Before
Hon. JOHN PAUL STEVENS, *Circuit Judge*
Hon. ROBERT A. SPRECHER, *Circuit Judge*
Hon. PHILIP W. TONE, *Circuit Judge*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

No. 74-1350 vs.

LEONARD CAPPETTO, et al.,
Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Illinois,
Eastern Division.
No. 74 C 503

This matter comes before the Court on defendants-appellants' petition for rehearing with suggestion for rehearing en banc and contingent motion for stay of mandate. On consideration whereof,

IT IS HEREBY ORDERED that the petition for rehearing be, and the same is hereby, DENIED.

IT IS FURTHER ORDERED that mandate be stayed for thirty (30) days provided that a petition for writ of certiorari is filed.

APPENDIX C

Decision of the District Court Rendered Orally on April 22, 1974

By way of a brief preface, so that my statement will be homewhat complete and take the form of a brief memorandum, let me recite that this is a civil action which has been brought by the United States to restrain the defendants from engaging in an illegal business, in alleged violation of Title 18, United States Code, Sections 1962(b), (c) and (d).

And it is alleged in the Government's complaint that at various relevant times and places the defendants engaged in a gambling business; that said activity diverted money and goods to illegitimate channels; and that interstate commerce was involved; and that all of this was in violation of Title 18, United States Code, Sections 1955 and 1962.

But despite the criminal-sounding nature of that allegation, the basic prayer for relief is the request for an injunction against continuing these described activities. And additional relief is sought in the form of an order upon the defendant Capetto and others to divest themselves of any interest in the business known as Western Avenue Billiards and in the premises where that business is operating.

Further the complaint seeks an order on the defendants disclosing the names, addresses and telephone numbers of everyone associated with them in the business, including, but not limited to, a list of persons known to the Government only by enumerated nicknames.

And finally, the Government seeks an order upon each defendant to report quarterly for ten years on his business activities and income.

The case was initiated with a request by the Government for a temporary restraining order. And a temporary restraining order was entered and enforced pending the resolution by the Court of the basic contention of the defendant that the statutory scheme under which the Government is proceeding is unconstitutional. And I hasten to add that the thorough consideration of this issue and the briefing schedule which gave everyone ample time to develop it was made possible only by the consent of the defendants to an extension of the temporary restraining order, far beyond the ten days to which the Government had a right to insist that it remain in force after my initial ruling.

Title 18, Section 1964 gives this Court jurisdiction to restrain violations of Section 1962. So Section 1962, in essence, prohibits racketeering activity to acquire or conduct a business affecting interstate commerce.

I know this is a very sketchy description of these statutes, but I know also that the litigants are thoroughly familiar with them and I didn't feel it was necessary to describe them in any greater detail.

Even though the activity described in Section 1962 is made criminal by that statute, the enjoining of such activity under the other section is purely a civil proceeding. And despite all of the words comporting criminality and criminal proceeding and suggesting that criminality of the section, the governing concept is that under Title 18, U.S.C., 1964, that no one can be fined or imprisoned. And therefore, whether you call it quasi-criminal or what, the

fact that nobody can be fined or go to jail for the violation of the section that is in issue here leads me to the inescapable conclusion that despite all of its overtones, it has to be regarded purely as a civil suit, seeking a civil remedy.

The essential philosophy of Section 1964 is that certain conduct is incompatible with the public interest and may be prevented by civil injunction. And, of course, this is by no means a novel concept. It may be novel that the conduct to be enjoined is also conduct violative of criminal laws, but this fact doesn't change the availability of the traditional civil remedies.

The only constitutional shortcoming which troubles me in this consideration of the statutes involved here is the allegation of vagueness. And this allegation is one that deserves serious consideration.

If a citizen stands in jeopardy of having his conduct enjoined by the Government, as distinguished from another civil litigant, he has a right to a statutory definition making such enjoinable conduct easily or readily ascertainable.

The vagueness issue requires basically a consideration of Title 18, Section 1962. The statute in question creating the injunctive remedy conditions its applicability to conduct described and defined in 1962. I note that in the defendants' briefs they disagree with that and would limit my consideration, under the vagueness issue, to one of the two statutes involved, rather than both; but I cannot follow that course of logic.

In consideration of whether the conduct subject to the injunction is adequately spelled out, it matters not that it is a criminal statute incorporated by reference into a civil remedy. If the statutory proscription can stand the

test of the due process clause in the criminal contest, it certainly adequately sets forth a standard of conduct in the context of an injunction.

I therefore find the statute, Sections 1962 and 1964, construed together, to be constitutional; and I so hold. This, and this alone, is the only ruling in the context of the motions before me at this time.

So that the defendants' motions to dismiss on constitutional grounds are denied.

There remains for determination, before we go much further with this case, however, some further issues which may be more difficult than the one that I have just decided.

Since this is a civil proceeding—and I have ruled that it is—the Government's motion for immunity granted under Title 18, Section 1002 and Section 1003 seems to be appropriate. But I recognize that the parties have not adequately had an opportunity to address themselves to that issue. And therefore, I reserve an open mind on it and we will discuss, in a moment, what we do next about that.

It seems equally obvious that the temporary restraining order—unless there is some disposition to extend it, which would surprise me—must shortly terminate and the propriety of a preliminary injunction must be established. And therefore, we need a hearing in the very near future on the transmittal of the TRO into an injunction, if the Government can maintain the burden required to do that.

And finally, I must comment, in passing, that some of the relief sought by the Government in its petition for preliminary injunction is far-reaching and a matter of some concern to me. I have particular reference to the requirement that the defendants file quarterly reports for an extended period.

Therefore, even if the injunction is justified, it may well be less comprehensive than the Government's prayer for relief. Even if a basis for justifying the issuance of an injunction is established, we still have before us the terms and conditions and details of such an injunction, which may be much more limited than what the Government seeks. And once again, I reserve ruling on that for a later date.

So the ruling on the underlying motion having been announced, I solicit your suggestions, gentlemen, as to what comes next in the timetable under which it comes.

Counsel, would you come up and help us in this determination?

Am I correct in assuming that the immunity issue is the next thing?

* * *

I have read the briefs and I realize that the immunity question has been treated and I think adequately. And I make no secret of what may have sounded like a hint earlier, I didn't intend it to, but I think having read the briefs, the Government has a right to demand testimony in exchange for adequate immunity as in anti-trust or other analogous situations.

I merely wanted to make it clear that if it is the thought of either party that because I focused on the constitutionality of the underlying statute, I deprived you of the right to fully explore the immunity issue, that we air that now and resolve it.

Mr. Lewis: I believe, your Honor, I stated my fundamental position with respect to immunity already of record. I would simply say this. The underlying rationale of the Kastigar doctrine is that a statement which is coerced

under use immunity is to be treated—and I think this is appropriate—as though it had been a coerced statement obtained in a police station through misconduct on the part of the investigating officers.

Now I would urge to the Court my conviction that if the Government were to attempt to predicate a claim for civil relief upon information which had been extorted from a suspect in the course of an illegal police interrogation, your Honor I think would be quite hard-pressed to accede to the notion that the Government could obtain relief on that basis. I suggest that the same rule properly should apply here.

I make that point to your Honor, as I say, in addition to the previous submissions made. Fundamentally, the Government attempts here to lift itself by its bootstraps.

The Court: Let me say that it is my position in the matter, Mr. Lewis,—and I obviously disagree with you that a statement coerced under use immunity is to be treated as a statement from a witness under subpoena, it's no different. The witness, however reluctantly, has been called in to testify and he has testified and he has been robbed of his Fifth Amendment right because of the immunity, but in all other respects the statement is just as though he had been subpoenaed and put on the stand and testified.

So that to that extent, and on the basis of that clear-cut 180 degree disagreement between us as to how this should be viewed, I would say that I do have enough before me, on the basis of the motions and your additional statements, to rule on the immunity issue, as well. And I think what I have just said indicates what my ruling would be on it.

Mr. Lewis: Quite clearly, your Honor. I merely will make the point they are not treated as though he had taken the stand and testified. They are treated as though he had been required to take the stand and testify under a grant, your Honor, of immunity against the use of his testimony for any penal purpose. And respectfully, your Honor, I suggest that that is precisely what the Government is attempting to do.

The Court: Well, I think it is. What I am saying, in effect, is that is what they can do.

• • •

ORDER

(Adjudging Defendants to be in Default)

This cause having come on to be heard on the motion of the plaintiff, due notice having been given, the Court having considered the aforesaid motion, affidavit in support thereof, and the record herein, and being fully advised in the premises, now therefore

FINDS:

1. That the defendants, Leonard L. Cappetto, Stanley J. Mikolajczak, Joseph A. Corabi, Thomas J. Wilson, Joseph I. Mantia, George J. Musteikas, and Nicholas J. Pidone, were on April 24, 1974, by this Court, upon the motion of the plaintiff, ordered and directed to appear, besworn, and give testimony at the depositions of said defendants sought to be taken on behalf of the plaintiff on April 25, 1974.

2. That the aforesaid defendants on April 25, 1974, failed to be sworn and to give any testimony, after being so directed by this Court.

3. That the said failure of the defendants to be sworn and to give testimony was a failure on the part of said defendants to obey an order to provide or permit discovery.

4. That the defendants, Leonard L. Cappetto, Stanley J. Mikolajczak, Joseph A. Corabi, Thomas J. Wilson, Joseph I. Mantia, George J. Musteikas, and Nicholas J. Pidone, were on April 24, 1974, by this Court, upon the motion of the plaintiff, ordered and directed to make response to the order requiring certain disclosures contained in the temporary restraining order entered herein and to the requests for admissions heretofore served upon them, within three days from the entry of said order.

5. That the defendants, through their counsel, have represented that they decline to make the responses as so ordered, and that they will continue so to decline, whether or not they are granted immunity from criminal prosecution under 28 U.S.C. §§6002 and 6003; that the defendant, Joseph A. Corabi, by order of this Court on April 22, 1974, has been granted such immunity, and continues to decline to make the aforesaid responses.

6. That this failure of the defendants to make the responses as ordered and directed by this Court, and their representation, through counsel, that they will continue to decline to make such responses, was and is a failure on the part of said defendants to obey an order to provide or permit discovery.

Now Therefore, IT IS ORDERED, ADJUDGED AND DECREED that the material allegations of the Complaint herein shall be and are hereby taken to be established for the purposes of this action, the defendants, Leonard L. Cappetto, Stanley J. Mikolajczak, Joseph A. Corabi,

Thomas J. Wilson, Joseph I. Mantia, George J. Musteikas, and Nicholas J. Pidone, be and are hereby found and adjudged in default, and judgment by default be and is hereby entered in favor of the plaintiff and against the defendants, Leonard L. Cappetto, Stanley J. Mikolajczak, Joseph A. Corabi, Thomas J. Wilson, Joseph I. Mantia, George J. Musteikas, and Nicholas J. Pidone, with preliminary injunction as prayed for by the plaintiff to issue.

ENTER:

/s/ Frank McGarr
United States District Judge

Dated: April 26, 1974.

Decree of Preliminary Injunction

This cause having come on to be heard on the motion of the United States for sanctions for failure to make discovery, pursuant to Rule 37(b)(2) of the Federal Rules of Civil Procedure, due notice having been given, the Court having considered said motion, the verified Complaint filed in this cause, the affidavits filed herein, and being fully advised in the premises, now therefore

FINDS:

1. That the material allegations of the verified Complaint are taken to be established for the purposes of this action.

2. That the defendants, Leonard L. Cappetto, Stanley J. Mikolajczak, Joseph A. Corabi, Thomas J. Wilson, Joseph I. Mantia, George J. Musteikas, and Nicholas J. Pidone, have been found and adjudged in default by order of this Court entered this date.

3. That the Court has jurisdiction of the subject matter of this action.

4. That all of the defendants reside in the Northern District of Illinois, Eastern Division.

5. The defendant, Leonard L. Cappetto, an individual, is the owner of and does business as Western Avenue Billiards, 8024 South Western Avenue, Chicago, Illinois.

6. On each day from on or about October 26, 1973, up to and including November 6, 1973, Joseph Corabi utilized the premises known as Western Avenue Billiards, 8024 South Western Avenue, Chicago, Illinois, and telephone number (312) 476-9710, located within the above-described premises, to receive horse race and sports bets and to transmit information relating to such wagering activity.

7. On various occasions, to wit: October 27, 1973, from October 29, 1973, up to and including November 3, 1973, and from November 5, 1973, up to and including November 6, 1973, Stanley J. Mikolajczak did receive horse race wagers and transmit information relating to such wagering activity within the above described premises and elsewhere and through the use of telephone number (312) 476-9710, located within the above-described premises.

8. On various occasions, to wit: October 27, 1973, and from October 29, 1973, up to and including October 30, 1973, Thomas Wilson utilized the above described premises and telephone number (312) 476-9710 to receive horse race wagers and to transmit information relating to such wagering activity.

9. On various occasions, to wit: October 26, 1973, from October 29, 1973, up to and including November 3, 1973, and on November 6, 1973, Joseph I. Mantia placed horse race wagers for persons other than himself with Joseph A. Corabi, Thomas J. Wilson and Stanley J. Mikolajczak, over telephone number (312) 476-9710.

10. On various occasions, to wit: from October 29, 1973, up to and including October 30, 1973, on November 1, 1973, and on November 3, 1973, George Musteikas did place horse race wagers for persons other than himself with Joseph A. Corabi and Stanley J. Mikolajczak over telephone number (312) 476-9710.

11. From October 26, 1973, up to and including November 6, 1973, Leonard Cappetto, owner of Western Avenue Billiards, 8024 South Western Avenue, Chicago, Illinois, permitted the use of these premises and telephone number (312) 476-9710, located therein, by Joseph A. Corabi, Thomas J. Wilson, and Stanley J. Mikolajczak, and other individuals whose identities are unknown to the plaintiff, knowing that said premises were being used to place and receive wagers and to transmit information relating to such wagering activity.

12. On various occasions from October 31, 1973, to the present date, the defendant, Nicholas J. Pidone, permitted the use of his residence by Thomas J. Wilson to place and receive wagers and to transmit information relating to such wagering activity, and on November 3 and 4, 1973, Nicholas J. Pidone placed sports wagers with Joseph A. Corabi and Stanley J. Mikolajczak in person and over telephone number (312) 476-9710.

13. On various occasions, to wit: from October 27, 1973, up to and including October 28, 1973, and from November 2, 1973, up to and including November 4, 1973, an individual known only to the plaintiff as "Joe" received sports wagers from, and transmitted information relating to such wagering activity to, Joseph A. Corabi, over telephone number (312) 476-9710.

14. On various occasions, to wit: October 27, 1973, and from October 29, 1973, up to and including October 30, 1973, persons known only to the plaintiff as "Eggs" or "Eggman", "Lefty", "Dan", "Chester" or "C.K.", and "Rosie" did place horse race wagers for persons other than themselves with Joseph A. Corabi, Thomas J. Wilson, and Stanley J. Mikolajczak over telephone number (312) 476-9710.

15. The aforesaid defendants did, through the pattern of racketeering activity described above, acquire or maintain, directly or indirectly, interest in or control of an enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce; that is, an illegal gambling business, in violation of Title 18, United States Code, Section 1955, in violation of Title 18, United States Code, Section 1962(b); that the said defendants, being persons employed by or association with an enterprise engaged in, or the activities of which affect interstate commerce, that is, an illegal gambling business, did conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through the pattern of racketeering activity described above, in violation of Title 18, United States Code, Section 1962(c).

16. Further, that it appears that the aforesaid acts have continued to the date of the entry of the temporary restraining order entered herein and will, unless restrained and enjoined by this Court, continue in the future.

NOW, THEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the defendants, Leonard L. Cappetto, individually and doing business as Western Avenue Billiards, Stanley J. Mikolajczak, Joseph A. Corabi, Thomas J. Wilson, Joseph I. Mantia, George J. Musteikas, Nicholas J. Pidone, their officers, agents,

servants, employees, attorneys, and those persons in active concert or participation with them, be and are hereby restrained and enjoined during the pendency of this action and until final termination thereof, from directly or indirectly doing or causing to be done any of the following acts:

A. Conducting, financing, managing, supervising, controlling, directing or owning all or any part of any illegal gambling business; that is, any business which involves five or more persons who conduct, finance, manage, supervise, direct or own all or part of such business, and which will involve gross revenue of $2,000.00 or more in any single day, and which is concerned with gambling, including, but not by way of limitation, pool selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, conducting lotteries, policy, bolita or numbers games, or selling chances therein; or any such business which is a violation of the laws of the State of Illinois;

B. Placing or receiving wagers or bets;

C. Transmitting information as to wagers, betting odds, or changes in betting odds;

D. Collecting or paying monies on account of a wager or bet;

E. Possessing or transferring a ticket, slip, record or document of a wager or bet;

F. Receiving proceeds or profits on account of any wagering or betting activity;

G. Permitting the use of the premises known as Western Avenue Billiards, 8024 South Western, Chicago, Illinois, or any other premises in which said defendants may

have any title, interest or right of management or control, or any communication facility located im such premises, for any of the above acts; and

H. Combining with any person who is directly or indirectly doing, or causing to be done, any of the aforesaid acts.

The jurisdiction of this Court is retaimed for the purpose of enforcing or modifying this decree and for the purpose of granting such additional or further relief as may hereafter appear necessary or appropriate.

ENTER:

/s/ Frank McGarr

United States District Judge

Dated at Chicago, Illinois, this 26th day of April, 1974.

Judgment and Commitment

This cause having come on to be heard on the motion of the plaintiff, by James R. Thompson, United States Attorney for the Northern District of Illinois, for sanctions for failure to make discovery, due notice having been given, the defendants having admitted, through counsel, that they had refused and would continue to refuse to be sworn and to answer any questions concerning the allegations of the Complaint at their depositions sought to be taken on behalf of plaintiff, and the Court being fully advised in the premises;

IT IS ADJUDGED that the defendants, Leonard L. Cappetto, Stanley J. Mikolajczak, Joseph A. Corabi, Thomas J. Wilson, Joseph I. Mantia, George J. Musteikas, and Nicholas J. Pidone, are in direct and continuing contempt of this Court for and by virtue of their failure to

obey the orders of this Court, dated and entered herein on April 24, 1974, directing the said defendants to appear, be sworn and give testimony at the depositions sought to be taken on behalf of plaintiff;

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the defendants, Leonard L. Cappetto, Stanley J. Mikolajczak, Joseph A. Corabi, Thomas J. Wilson, Joseph I. Mantia, George J. Musteikas, and Nicholas J. Pidone, be and they are hereby committed to the custody of the United States Marshal for the Northern District of Illinois until such time as the said defendants shall obey said orders.

ENTER:
/s/ Frank McGarr
United States District Judge

Dated at Chicago, Illinois, this 26th day of April, 1974.

APPENDIX D

Relevant Statutes (Title 18, U.S. Code)

§ 1955. Prohibition of illegal gambling businesses

(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined not more than $20,000 or imprisoned not more than five years, or both.

(b) As used in this section—

(1) "illegal gambling business" means a gambling business which—

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty days or has a gross revenue of $2,000 in any single day.

(2) "gambling" includes but is not limited to pool-selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, and conducting lotteries, policy, bolita or numbers games, or selling chances therein.

(3) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

(c) If five or more persons conduct, finance, manage, supervise, direct, or own all or part of a gambling business and such business operates for two or more successive days, then, for the purpose of obtaining warrants for arrests, interceptions, and other searches and seizures, probable cause that the business received gross revenue in excess of $2,000 in any single day shall be deemed to have been established.

(d) Any property, including money, used in violation of the provisions of this section may be seized and forfeited to the United States. All provisions of law relating to the seizures, summary, and judicial forfeiture procedures, and condemnation of vessels, vehicles, merchandise, and baggage for violation of the customs laws; the disposition of such vessels, vehicles, merchandise, and baggage or the proceeds from such sale; the remission or mitigation of such forfeitures; and the compromise of claims and the award of compensation to informers in respect to such forfeitures shall apply to seizures and forfeitures incurred or alleged to have been incurred under the provisions of this section, insofar as applicable and not inconsistent with such provisions. Such duties as are imposed upon the collector of customs or any other person in respect to the seizure and forfeiture of vessels, vehicles, merchandise, and baggage under the customs laws shall be performed with respect to seizures and forfeitures of property used or intended for use in violation of this section by such officers, agents, or other persons as may be designated for that purpose by the Attorney General.

(e) This section shall not apply to any bingo game, lottery, or similar game of chance conducted by an organization exempt from tax under paragraph (3) of subsection (c) of section 501 of the Internal Revenue Code of

1954, as amended, if no part of the gross receipts derived from such activity inures to the benefits of any private shareholder, member, or employee of such organization except as compensation for actual expenses incurred by him in the conduct of such activity.

Added Pub.L. 91-452, Title VIII, § 803(a), Oct. 15, 1970, 84 Stat. 937.

§ 1961. Definitions

As used in this chapter—

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2314 and

2315 (relating to interstate transportation of stolen property), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), or (D) any offense involving bankruptcy fraud, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States;

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury,

and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

* * *

§ 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issued, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is en-

gaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

Added Pub.L. 91-452, Title IX, § 901(a), Oct. 15, 1970, 84 Stat. 942.

§ 1963. Criminal penalties

(a) Whoever violates any provision of section 1962 of this chapter shall be fined not more than $25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962.

(b) In any action brought by the United States under this section, the district courts of the United States shall have jurisdiction to enter such restraining orders or prohibitions, or to take such other actions, including, but not limited to, the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to forfeiture under this section, as it shall deem proper.

(c) Upon conviction of a person under this section, the court shall authorize the Attorney General to seize all property or other interest declared forfeited under this section upon such terms and conditions as the court shall deem proper. If a property right or other interest is not exercisable or transferable for value by the United States, it shall expire, and shall not revert to the convicted person. All provision of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the collector of customs or any other person with respect to the disposition of property under the customs laws shall be performed under this chapter by the Attorney General. The United States shall dispose of all such property as soon as commercially feasible, making due provision for the rights of innocent persons.

Added Pub.L. 91-452, Title IX, § 901(a), Oct. 15, 1970, 84 Stat. 943.

§ 1964. Civil remedies

(a) The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or

investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons.

(b) The Attorney General may institute proceedings under this section. In any action brought by the United States under this section, the court shall proceed as soon as practicable to the hearing and determination thereof. Pending final determination thereof, the court may at any time enter such restraining orders or prohibitions, or take such other actions, including the acceptance of satisfactory performance bonds, as it shall deem proper.

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

(d) A final judgment or decree rendered in favor of the United States in any criminal proceeding brought by the United States under this chapter shall estop the defendant from denying the essential allegations of the criminal offense in any subsequent civil proceeding brought by the United States.

Added Pub.L. 91-452, Title IX § 901(a), Oct. 15, 1970, 84 Stat. 943.

APPENDIX E

Complaint For Injunction (filed February 22, 1974)

Now comes the plaintiff United States of America by its attorney, James R. Thompson, United States Attorney for the Northern District of Illinois, and complains and alleges as follows:

COUNT I

1. This is a civil action brought by the United States of America to restrain the defendants from engaging in an illegal gambling business in violation of Title 18, United States Code, Sections 1962(b), 1962(c) and 1962(d).

2. This action is brought pursuant to Title 18, United States Code, Section 1964(b) at the direction of the Attorney General of the United States.

3. This Court has jurisdiction of this action under Title 18, United States Code, Section 1964(a) and Title 28, United States Code, Section 1345.

4. Western Avenue Billiards is a pool hall located at 8024 South Western Avenue, Chicago, Illinois.

5. The defendant, Leonard L. Cappetto resides at 11022 South Sawyer Avenue, Chicago, Illinois, and is the owner of and does business as Western Avenue Billiards at 8024 South Western Avenue, Chicago, Illinois.

• • •

12. All the defendants reside in the Northern District of Illinois, Eastern Division, within the jurisdiction of this Court.

13. There has been at all times herein mentioned and is now in effect Title 18, United States Code, Section 1961, which provides in part as follows: [here quoting portions of the statute, reprinted in full in this appendix, post.]

14. There has been at all times herein mentioned and is now in effect Title 18, United States Code, Section 1962, which provides in part: [here quoting portions of the Statute, reprinted in full within this appendix, post.]

15. There has been at all times herein mentioned and is now in effect Title 18, United States Code, Section 1955, which provides in part: [here quoting portions of the Statute, reprinted in full within this appendix, post.]

16. There has been at all times herein mentioned and is now in effect Chapter 38, Illinois Revised Statutes, Section 28-1.1, which provides in part:

> (b) A person commits syndicated gambling when he operates a "policy game" or engages in the business of bookmaking.
>
> (d) A person engages in bookmaking when he receives or accepts more than five bets or wagers upon the result of any trials or contests of skill, speed or power of endurance or upon any lot, chance, casualty, unknown or contingent event whatsoever, which bets or wagers shall be of such size that the total of the amounts of money paid or promised to be paid to such bookmaker on account thereof shall exceed $2,000. Bookmaking is the receiving or accepting of such bets or wagers regardless of the form or manner in which the bookmaker records them.
>
> (f) A person convicted of syndicated gambling shall be imprisoned in the penitentiary for from one

to 5 years. Added by act approved April 21, 1965. L.1965, p. 388.

17. From on or about October 26, 1973, up to and including the date of filing of this complaint, on at least two occasions, said defendants, and other persons whose identities are unknown to plaintiff, did in the Northern District of Illinois, Eastern Division, conduct, finance, manage, supervise, direct or own all or part of an illegal gambling business, such business having a gross revenue of two thousand dollars ($2,000) or more on a single day involving five or more persons in its conduct, financing, management, supervision, direction or ownership, and being in violation of Illinois Revised Statutes, Chapter 38, Sections 28-1(a)(2), 28-1(a)(5), 28-1(a)(10) and 28-1.1(d), all in violation of Title 18, United States Code, Section 1955, in that:

A. On each day from on or about October 26, 1973, up to and including November 6, 1973, Joseph A. Corabi utilized the premises known as Western Avenue Billiards, 8024 South Western Avenue, Chicago, Illinois, and telephone number (312) 476-9710, located within the above-described premises, to receive horse race and sports bets and to transmit information relating to such wagering activity.

B. On various occasions, to wit: October 27, 1973, from October 29, 1973, up to and including November 3, 1973 and from November 5, 1973, up to and including November 6, 1973, Stanley J. Mikolajczak did receive horse race wagers and transmit information relating to such wagering activity within the above-described premises and elsewhere and through the use of telephone number (312) 476-9710, located within the above-described premises.

C. On various occasions, to wit: October 27, 1973, and from October 29, 1973, up to and including October 31, 1973, Thomas J. Wilson utilized the above-described premises and telephone number (312) 476-9710 to receive horse race wagers and to transmit information relating to such wagering activity.

D. On various occasions, to wit: October 26, 1973, from October 29, 1973, up to and including November 3, 1973, and on November 5 and 6, 1973 Joseph I. Mantia placed horse race wagers for persons other than himself with Joseph A. Corabi, Thomas J. Wilson and Stanley J. Mikolajczak, over telephone number (312) 476-9710.

E. On various occasions, to wit: from October 29, 1973, up to and including October 30, 1973, on November 1, 1973, and on November 3, 1973, George J. Musteikas did place horse race wagers for persons other than himself with Joseph A. Corabi and Stanley J. Mikolajczak over telephone number (312) 476-9710.

F. From October 26, 1973, up to and including November 6, 1973, Leonard L. Cappetto, owner of Western Avenue Billiards, 8024 South Western Avenue, Chicago, Illinois, permitted the use of these premises and telephone number (312) 476-9710, located therein, by Joseph A. Corabi, Thomas J. Wilson, and Stanley J. Mikolajczak, and other individuals whose identities are unknown to the plaintiff, knowing that said premises were being used to place and receive wagers and to transmit information relating to such wagering activity.

G. On various occasions, to wit: from October 27, 1973, up to and including October 28, 1973, and from November 2, 1973, up to and including November 4, 1973, an individual known only to the plaintiff as "Joe" received sports wagers from, and transmitted information relat-

ing to such wagering activity to Joseph A. Corabi over telephone number (312) 476-9710.

H. On various occasions, to wit: on November 3 and 4, 1973, Nicholas J. Pidone did place sports wagers for persons other than himself with Joseph A. Corabi and Stanley J. Mikolajczak in person and over telephone number (312) 476-9710.

I. From October 31, 1973 to and including the date of filing of this complaint, Nicholas J. Pidone permitted Thomas J. Wilson to use his, Pidone's, residence to place and receive wagers and to transmit information relating to such wagering activity.

J. On various occasions, to wit: October 27, 1973, and from October 29, 1973, up to and including October 30, 1973, and from November 2, 1973, up to and including November 6, 1973, persons known only to the plaintiff as "Eggs" or "Eggman", "Lefty", "Dan", "Chester" or "C.K.", and "Rosie" did place sports and horse race wagers for persons other than themselves with Joseph A. Corabi, Thomas J. Wilson, and Stanley J. Mikolajczak over telephone number (312) 476-9710.

18. That the pattern of racketeering activity described above and the collection of unlawful debts daily results in the diversion of money and goods from legitimate enterprises into illegal and illegitimate channels. The aforementioned acts constitute a continuing violation of Title 18, United States Code, Section 1955 and Section 1962.

19. That there exist other persons not named as defendants herein, whose names or identities are known to plaintiff only as "Joe"; "Eggs" or "Eggman"; "Lefty"; "Dan"; "Chester" or "C.K."; and "Rosie"; and whose locations are not known to plaintiff but whose true names,

identities or locations are known to some or all of the above-named defendants, and who are in active concert or participation with the said named defendants in the commission of the aforedescribed violations of Title 18, United States Code, Section 1962. That there are or may be, in addition to the persons named as defendants herein and those other persons referred to above, certain other persons, whose names, identities and locations are unknown to plaintiff but whose names, identities and locations are known to some or all of the above named defendants, which persons are or may be in active concert or participation with the said named defendants in the commission of the aforedescribed violations of Title 18, United States Code, Section 1962. That it is necessary in the interest of justice and in order to afford plaintiff complete and meaningful relief in this cause, that the true names, identities and locations of the aforesaid persons be disclosed and made known to plaintiff.

20. Said defendants did, through the pattern of racketeering activity described in paragraph 17 above, or through collection of an unlawful debt, acquire or maintain, directly or indirectly, interest in or control of an enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce; that is, an illegal gambling business, in violation of Title 18, United States Code, Section 1955, all in violation of Title 18, United States Code, Section 1962(b).

COUNT II

21. Plaintiff United States of America realleges and incorporates herein by reference paragraphs 1 through and including 19 of Count I of this complaint.

22. Said defendants, being persons employed by or associated with an enterprise engaged in, or the activities

of which affect, interstate commerce, that is, an illegal gambling business, did conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through the pattern of racketeering activity described in paragraph 17 of Count I of this complaint, or through the collection of an unlawful debt, all in violation of Title 18, United States Code, Section 1962(c).

COUNT III

23. Plaintiff United States of America realleges and incorporates herein by reference paragraphs 1 through and including 19 of Count I of this complaint.

24. Said defendants did combine, conspire, confederate and agree together and with each other and with persons whose names and identities are unknown to the United States of America to violate Title 18, United States Code, Section 1962(b) and (c).

25. In furtherance of said conspiracy, Leonard L. Cappetto permitted the premises, facilities of and business known as Western Avenue Billiards to be used by defendants as a site from which to conduct an illegal gambling business in violation of Illinois law and the laws of the United States.

26. In furtherance of said conspiracy, Nicholas J. Pidone permitted his residence to be used by defendants as a site from which to conduct an illegal gambling business in violation of Illinois law and the laws of the United States.

27. In furtherance of said conspiracy and to effect the objects thereof, defendants did commit, among others, overt acts as described in paragraph 17 of Count I of this complaint.

28. By perpetrating the aforesaid acts, defendants are in violation of Title 18, United States Code, Section 1962 (d).

Wherefore, plaintiff, the United States of America, prays as follows:

1. That the above named defendants, together with each and all of their officers, agents, servants, employees, attorneys, and those persons in active concert or participation with them, he perpetually and permanently restrained and enjoined from directly or indirectly doing, or causing to be done, any of the following acts:

A. Conducting, financing, managing, supervising, controlling, directing or owning all or any part of any illegal gambling business; that is, any business which involves five or more persons who conduct, finance, manage, supervise, direct or own all or part of such business, and which will involve gross revenues of $2,000.00 or more in any single day, and which is concerned with gambling, including, but not by way of limitation, pool selling, bookmaking, maintaining slot machines, roulette wheels or dice tables, conducting lotteries, policy, bolita or numbers games, or selling chances therein; or any such business which is a violation of the laws of the State of Illinois;

B. Placing or receiving wagers or bets;

C. Transmitting information as to wagers, betting odds, or changes in betting odds;

D. Collecting or paying monies on account of a wager or bet;

E. Possessing or transferring a ticket, slip, record or document of a wager or bet;

F. Receiving or transferring proceeds or profits on account of any wagering or betting activity;

G. Permitting the use of the premises known as Western Avenue Billiards, 8024 South Western, Chicago, Illinois, or any other premises in which said defendants may have any title, interest or right of management or control, or any communication facility located in such premises, for any of the above acts; and

H. Combining with any person who is directly or indirectly doing, or causing to be done, any of the aforesaid acts.

2. That the Court issue a Temporary Restraining Order, temporarily restraining and enjoining the defendants, and each and all of their officers, agents, servants, employees, attorneys, and those persons in active concert or participation with them, as prayed above, until such time as a hearing may be had on plaintiff's application for preliminary injunction.

3. That the defendants, and each and all of their officers, agents, servants, employees, attorneys, and those persons in active concert or participation with them, be enjoined and restrained as prayed above during the pendency of this action.

4. That the defendant Leonard L. Cappetto be ordered and directed to divest himself of any right, title or interest in the premises commonly known as 8024 South Western Avenue, in Chicago, Illinois, and in the business located thereon, now operated under the name and style of "Western Avenue Billiards."

5. That the defendants be ordered and directed to disclose to plaintiff, forthwith upon demand, the true names, identities, present addresses or whereabouts, and telephone numbers of all persons in active concert or participation with all or any of them in the activities, offenses,

and violations herein complained of; and especially, but not by way of limitation, that said defendants be ordered and directed so to disclose to plaintiff the true names, identities, present addresses or whereabouts, and telephone numbers of those persons whose names or identities are presently known to plaintiff only as "Joe", "Eggs" or "Eggman", "Lefty", "Dan", "Chester" or "C.K.", and "Rosie".

6. That each and every defendant be ordered and directed to submit a written quarterly report, under oath, to the United States Attorney for the Northern District of Illinois beginning on a date to be fixed by the Court and every three months thereafter for a period of ten years, stating (i) the defendant's current residence address, (ii) the name and address of the defendant's current employer or employers, or if self employed, the defendant's current business and business address, (iii) the sources and amount of the defendant's gross income for the period covered by the written report, (iv) the name and address of each enterprise from which the defendant receives any income or in which the defendant has any interest or in which the defendant is associated describing the nature of such income, interest, or association, and (v) such other and further information as may appear to the Court from time to time to be necessary and proper to carry out the purposes of Title 18, United States Code, Section 1964; and

7. For such other further and different relief which the Court may deem just and proper, together with the cost and disbursements of this action.

/s/ James R. Thompson

James R. Thompson
United States Attorney

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-513

LEONARD L. CAPPETTO, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 502 F. 2d 1351.

JURISDICTION

The judgment of the court of appeals was entered on September 4, 1974. A timely petition for rehearing with suggestion for rehearing *en banc* was denied on October 1, 1974 (Pet. App. B). The petition for a writ of certiorari was filed on October 31, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether, in an action for an injunction and other civil relief under the anti-racketeering statute (18 U.S.C. 1961, *et. seq.*), a defendant is entitled to the procedural rights of a defendant in a criminal case.

2. Whether a showing of special circumstances necessitating equitable intervention is a prerequisite to the granting of civil relief under 18 U.S.C. 1964.

3. Whether 18 U.S.C. 1962(b) and (c), making it unlawful to acquire or conduct the affairs of an enterprise in commerce through a pattern of racketeering activity or through the collection of an unlawful debt, do not apply to a gambling business made unlawful by 18 U.S.C. 1955.

4. Whether 18 U.S.C. 1955 unconstitutionally exceeds the power of Congress to regulate commerce.

STATUTES INVOLVED

The pertinent statutes, 18 U.S.C. 1955 and 1961 through 1964, are set forth in Appendix D to the petition.

STATEMENT

The United States filed a complaint (Pet. App. E 37-46) in the United States District Court for the Northern District of Illinois, pursuant to 18 U.S.C. 1964, alleging in two counts that petitioners had acquired or maintained an interest in or control of an enterprise, and had conducted or participated in the conduct of the affairs of the enterprise, through a "pattern of racketeering activity" or through "collection of an unlawful debt," in violation of 18 U.S.C. 1962(b) and (c) (Pet. App. E 39-43). A third count alleged a conspiracy to commit the above acts, in violation of 18 U.S.C. 1962(d). The alleged pattern of

racketeering activity and collection of an unlawful debt were in connection with petitioners' participation on two or more occasions in an illegal gambling business, in violation of 18 U.S.C. 1955 (Pet. App. E 43-44).[1] The relief sought included preliminary and permanent injunctions restraining petitioners and those acting in concert with them from engaging in an illegal gambling operation; divestiture by petitioner Cappetto of his interest in a building; disclosure of the identities of persons acting in concert with petitioners in the gambling operation, including those known to the government only by nicknames; an order directing each petitioner to submit to the United States Attorney for a period of ten years sworn quarterly reports stating his current address, business, sources of income, and other information bearing on his compliance with the injunction requested; and such further relief as the court deemed just (Pet. App. E 44-46).

---

[1] "Racketeering activity" is defined in 18 U.S.C. 1961(1); a "pattern of racketeering activity" is defined in 18 U.S.C. 1961(5) as requiring "at least two acts of racketeering activity * * *." An "unlawful debt" includes a debt "incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof * * *." 18 U.S.C. 1961(6).

Specifically, the complaint alleged that petitioners Corabi, Mikolajczak and Wilson used a building and a telephone located therein to conduct a gambling operation with the knowledge of the building owner, petitioner Cappetto; that petitioners Mantia, Musteikas and Pidone, along with others known to the government only by nicknames, placed wagers with Corabi, Mikolajczak and Wilson for persons other than themselves; that the operation had a gross revenue of over $2,000 in a single day and invoived five or more persons, in violation of Illinois law and 18 U.S.C. 1955 (Pet. App. E 38-43).

The district court denied petitioners' motion to dismiss the complaint and entered various discovery orders. Petitioners, relying on their Fifth Amendment privilege against self-incrimination, refused to comply with the discovery orders and, except for Corabi, refused even to appear for depositions. Corabi appeared but refused to be sworn or deposed despite an order granting him "use" immunity under 18 U.S.C. 6002 and 6003. The court then ordered (1) that, by reason of petitioners' refusals to comply with discovery orders, the material allegations of the complaint were taken as true, petitioners were adjudged in default, and a default judgment should be entered against them; (2) that petitioners be enjoined *pendente lite* from carrying on the gambling operation; and (3) that they be held in contempt and committed until they obeyed the discovery orders, execution of the commitment order to be stayed pending appeal (Pet. App. C 20-28).

The court of appeals, while noting that it was "premature to consider whether divestiture or a reporting requirement in any form would be appropriate in this case, because the District Court has not yet ruled on the requests for these kinds of relief" (Pet. App. A 11), affirmed the orders of the district court (Pet. App. A 1-12).

ARGUMENT

1. The petition raises a number of issues concerning the constitutionality and application of Sections 1955, 1962 and 1964, most of which are not properly before the Court at this time. Thus, petitioners' claims concerning the relief that might be granted against them in this case are premature, as the court of appeals noted (Pet. App. A 11), because the district court has not yet entered a final judgment granting any such relief.

In addition, petitioners' challenges to the validity of the underlying statutes were not properly before the court of appeals for definitive resolution, because the district court's orders denying petitioners' motion to dismiss and adjudging them in default were not appealable final judgments. See 28 U.S.C. 1291. Compare Fed. R. Civ. P. 54(b); 28 U.S.C. 1292(b).

Similarly, the district court's order holding petitioners in civil contempt for refusing to appear or testify at their depositions was also not properly before the court of appeals, this Court having held that orders imposing civil sanctions against a party for failing to comply with discovery orders are not directly appealable. *E.g.*, *Doyle* v. *London Guar. & Acc. Co.*, 204 U.S. 599; see *International Bus. Machs. Corp.* v. *United States*, 493 F. 2d 112, 115 (C.A. 2), certiorari denied, 416 U.S. 995; cf. *Fox* v. *Capital Co.*, 299 U.S. 105, 107-108.

Finally, while petitioners were entitled to appeal from the district court's order granting a preliminary injunction (see 28 U.S.C. 1292(a)(1)), the question before the court of appeals was limited, as would be the question before this Court, to whether the district court had abused its discretion. See, *e.g.*, *Brown* v. *Chote*, 411 U.S. 452, 457.

Accordingly, this case is not an appropriate one in which to consider the questions raised by petitioners. In any event, there is no conflict among the circuits concerning the validity and scope of the relatively new statutes in issue, and the court of appeals correctly rejected petitioners' contentions in a thorough opinion upon which we rely.

2. Petitioners' principal claim is that, because the facts that would warrant civil relief pursuant to Section 1964 would also constitute violation of a criminal statute (18 U.S.C. 1962 and 1963), they were entitled in this proceeding to all the procedural protections of a criminal case (Pet. 16-24). The court of appeals properly rejected this claim (Pet. App. A 5-8):

> Congress also has power to provide for civil injunctive relief against activities which adversely affect interstate commerce, and that power extends to activities which are made criminal by state or federal law. Long ago the Supreme Court, in the case of *In re Debs*, 158 U.S. 564 (1895), held that the commerce clause authorizes the federal government, through injunctive relief granted by its courts, to restrain or remove obstructions to interstate commerce * * *.
>
> * * * * *
>
> In the exercise of its authority to regulate commerce, Congress has also provided civil actions for injunction as alternatives to criminal actions in the Federal Food, Drug and Cosmetic Act, 21 U.S.C. §§ 321-334, the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. § 135, *et seq.*, and the Meat Inspection Act, 21 U.S.C. §§ 674-676. Acting under other constitutional grants of authority, Congress has provided alternative civil and criminal remedies in the Internal Revenue Code, 26 U.S.C. §§ 7201, 7231, 7402; and the three emergency price control acts, the Emergency Price Control Act of 1942, 56 Stat. 26, the Defense Production Act of 1950, 50 App. U.S.C. § 2109, and the Economic Stabilization Act of 1970, 12 U.S.C.A. § 1904 note.

Nothing in the Constitution prevents Congress from providing for both civil and criminal enforcement of a statute.

* * * * *

Defendants unsuccessfully attempt to distinguish what they refer to as "the federal anti-trust, pure food, and similar statutes." They argue that the civil proceedings provided for in those statutes, unlike those under Section 1964, are not designed as alternatives to criminal prosecution to serve when the requisite proofs are lacking. Neither, necessarily, is a proceeding under Section 1964, but the standard of proof is lower in a civil proceeding than it is in a criminal proceeding under any of the statutes we are considering. Defendants argue that the other statutes were designed to serve values "totally different from the purely criminal thrust of the Organized Crime Control Act." We see no basis in this distinction, if it is one, for circumscribing Congress' power to regulate activities affecting interstate commerce. Conduct adversely affecting interstate commerce which is of a kind that is traditionally proscribed under criminal statutes, state or federal, does not enjoy a special immunity from regulation through civil proceedings, as the Supreme Court pointed out in the *Debs* case.

This is not a case in which the procedure "though technically a civil proceeding, is in substance and effect a criminal one," as was *Boyd* v. *United States*, 116 U.S. 616, 634 (1886), on which defendants rely heavily. *Boyd* was expressly distinguished in *Debs, supra* (158 U.S. at 594) * * *. Similarly, *In re Gault*, 387 U.S. 1 (1967) and *In re Winship*, 397 U.S. 358 (1970), relied upon by defendants, in-

volved juvenile proceedings which were civil in name but in which sanctions of a criminal nature were imposed. *One 1958 Plymouth Sedan* v. *Pennsylvania*, 380 U.S. 693, 696-698 (1965) and *United States* v. *U.S. Coin & Currency Co.*, 401 U.S. 715 (1971), also relied upon by defendants, involved forfeitures. No forfeiture is provided for in Section 1964 or sought by the government in this proceeding.

Section 1964 provides for a civil action in which only equitable relief can be granted. The relief authorized by that section is remedial not punitive and is of a type traditionally granted by courts of equity. It is the same kind of equitable relief that federal courts have been granting for generations in civil actions under Section 4 of the Sherman Act and Section 15 of the Clayton Act, 15 U.S.C. §§ 4 and 25.

With particular reference to the contempt orders, the court of appeals properly held (*id.* at A 11-12):

Since this was a civil proceeding, plaintiff was entitled to discovery as in any other civil case, and the court had the authority granted by the Federal Rules of Civil Procedure to enter appropriate discovery orders and to enforce those orders. Defendants have no more right to refuse to be sworn or to refuse to submit to questioning than any other party in a civil case. A defendant of course has the right under the Fifth Amendment to refuse to answer a specific question on the ground that the answer may tend to incriminate him. This right disappears, however, if use immunity is granted under 18 U.S.C. §§ 6002 and 6003, as it was to defendant Corabi. The immunity granted is coextensive with the privilege against self-incrimination, *Kastigar* v. *United States*, 406 U.S. 441,

461 (1972), and therefore may be invoked only against criminal proceedings. Accordingly, testimony given by a party in a civil case under a grant of immunity may be used against that party in that case, although it cannot be used in any criminal proceeding against him. When Corabi refused to testify despite the grant of immunity, and when the other defendants refused to obey the court's order to appear for depositions, they were in contempt and subject to sanctions under Rule 37, F. R. Civ. P. The District Court had authority to declare them in default and also had authority to hold them in contempt and to order them committed until they purged themselves of the contempts.

3. Petitioners contend that Section 1964 is unconstitutionally vague unless it is construed as limiting equitable relief to cases involving irreparable injury or other unusual circumstances (Pet. 29-36). Although that claim is largely premature, it was properly rejected by the court of appeals (Pet. App. A 8-9, 10-11):

> * * * Section 1964 * * *, like Section 4 of the Sherman Act, is merely a specific grant of jurisdiction to enforce the substantive provisions of the statute by injunction. The kinds of activity to which the injunction may be addressed are described with sufficient particularity in those substantive provisions, Section 1955 and Section 1962. Defendants do not argue that either of these sections is unconstitutionally vague. Nor do they question that the alleged gambling activities are covered by Section 1955. * * *
>
> The conditions under which an injunction will be issued pursuant to Section 1964 are determinable from the principles that govern the granting of equitable relief. [Citations omitted.] Whether equitable relief is

> appropriate depends, as it does in other cases in equity, on whether a preponderance of the evidence shows a likelihood that the defendants will commit wrongful acts in the future, a likelihood which is frequently established by inferences drawn from past conduct.
>
> * * * * *
>
> We need not decide the academic question of whether, in the absence of Section 1964, such a showing would be necessary. It was plainly the intention of Congress in adopting Section 1964 to provide for injunctive relief against violations of Section 1962 without any requirement of a showing of irreparable injury other than that injury to the public which Congress found to be inherent in the conduct made unlawful by Section 1962. It is also obvious that Congress did not intend to require a showing of inadequacy of the remedy at law. If, as defendants contend, the existence of the criminal remedy at law under Section 1963 would defeat an action in equity under Section 1964, the latter section would be a nullity.

4. Petitioners' contention that Sections 1962 and 1964 are applicable only to infiltration of otherwise legitimate business (Pet. 25-28) was likewise properly rejected by the court of appeals (Pet. App. A 9-10):

> Both the statutory language and the legislative history, however, support the government's contrary interpretation of the Act. While one of Congress' targets was "the infiltration of legitimate organizations by organized crime" (Sen. Rep. 91-617, p. 80 (1969)), and subsection (a) of Section 1962 is aimed at that target, Congress also intended to prohibit any pattern of racketeering activity in or affecting commerce; and subsections (b) and (c) of Section 1962 specifically prohibit such activity. Subsection

> (b) forbids acquiring or maintaining an interest in an enterprise which affects commerce through a pattern of racketeering activity or through collection of an unlawful debt; and subsection (c) forbids participation in the affairs of such an enterprise through those means. That Congress intended to give the term "enterprise" a very broad meaning is recognized in a recent Second Circuit case. *United States* v. *Parness*, [503 F. 2d 430 (C.A. 2), certiorari denied, No. 74-274, January 13, 1975] * * *. There is nothing in the language of subsection (b) or (c) or in the definition section of the Act, Section 1961, to suggest that the enterprise must be a legitimate one.

5. Finally, the court of appeals also properly rejected petitioners' contention (Pet. 36-40) that Section 1955 unconstitutionally exceeds Congress' power to regulate commerce (Pet. App. A 4-5):

> The power of Congress to prohibit activities made unlawful by state law which take place in, or affect, interstate commerce has long been settled. *Caminetti* v. *United States*, 242 U.S. 470 (1917); *Wickard* v. *Filburn*, 317 U.S. 111 (1942). The Supreme Court has upheld the federal loanshark statute (18 U.S.C. § 891) against a challenge similar to the one made by defendants here. *Perez* v. *United States*, 402 U.S. 146 (1971). This court and other courts of appeals have held that Section 1955 is authorized by the commerce clause. [Citations omitted.] These cases demonstrate that Congress had power to determine that the class of activities described in Section 1955 adversely affects interstate commerce and, based upon that finding, to prohibit those activities. It is also settled, on the authority of

Perez, that the statute is valid "even when applied to individual members of the class whose own activities may not have any demonstrable impact on interstate commerce." * * * [Citing *United States* v. *Hunter*, 478 F.2d 1019, 1021 (C.A. 7), certiorari denied, 414 U.S. 857; *Schneider* v. *United States*, 459 F. 2d 540, 541 (C.A. 8), certiorari denied, 409 U.S. 877; *United States* v. *Becker*, 461 F. 2d 230, 233-234 (C.A. 2).]

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JANUARY 1975.

FILED
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MICHAEL RODAK, JR., CLE

No. 74-513

In the Supreme Court of the United States

OCTOBER TERM, 1974

LEONARD L. CAPPETTO, STANLEY J. MIKOLAJCZAK, JOSEPH A. CORABI, THOMAS J. WILSON, JOSEPH I. MANTIA, GEORGE J. MUSTEIKAS and NICHOLAS J. PIDONE,

Petitioners,

VS.

UNITED STATES OF AMERICA,

Respondent.

On A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITIONERS' REPLY

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VS.

UNITED STATES OF AMERICA,

Respondent.

On A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITIONERS' REPLY

May It Please the Court:

Bearing in mind the provisions of Rule 24, this Reply is limited to arguments first raised in the government's brief in opposition.

The respondent contends that most of the issues raised by petitioners are not properly before the Court. In that aspect, the government argues that the contempt orders were not appealable at all. It concedes that temporary

injunction is appealable, but states that the only issue is whether the district court abused its discretion. We will here briefly urge that both those contentions are untenable.

The government further states that the statute is relatively new, so that there is no conflict among the circuits concerning the issues we have raised. That contention is necessarily correct as far as it goes, since the opinion below was the first ever to consider the relevant statute at the appellate level. However, a conflict has assuredly arisen at the district court level. We here append and briefly discuss a recent district court opinion inconsistent with the basic thrust of the opinion here sought to be reviewed, in regard to the fundamental issue between the parties.

Finally, we would note that the government has restated one of our principal contentions so as to avoid entirely the question whether investment or infiltration is a necessary element of the civil action under 18 USC 1962.

1.

The government here contends for the first time that the contempt orders were not appealable. (In the trial court it adopted the opposite view, and in the Court of Appeals the issue was neither raised nor considered.)

The philosophical base of the government's contention was directly rejected by this Court's recent opinion in *Maness* v. *Meyers,* (No. 73-689, January 15, 1975, 16 Cr. L. 3023, 3027). It also proceeds from a total misconception of the citations on which the government relies.

If it were true that the government could file a civil suit against an alleged criminal to compel a confession of criminality, on pain of indefinite imprisonment without

right of appellate review, that would be the most frighteningly authoritarian aspect of the entire proceeding.

But it is not true. The government cites *Doyle* v. *London Guaranty,* 204 U.S. 599, which merely construed the jurisdictional requirements of the Circuit Court of Appeals Act of 1891. 204 U.S. at 608. Appeals from contempt adjudications based on refusals to testify are now authorized by express statute, 28 USC 1826 (b). That is a total answer to the government's contention. (Its other citations deal with conditional rulings, appeal wherefrom was obviously premature.)

In any event, the question whether a contempt adjudication against a party is appealable immediately or whether it must await the final judgment, is determined by whether purely private rights are involved, or whether the purpose of the citation was "to redress the public wrong" or "vindication of the public justice". *Leman* v. *Krentler-Arnold Co.* (1932) 284 U.S. 448, 456; *Fox* v. *Capital Co.* (1936) 299 U.S. 105, 107, 110; *Michaelson* v. *United States* (1924) 266 U.S. 42, 64; *Gompers* v. *Bucks Stove and Range Co.* (1910) 221 U.S. 418, 445.

The government is not here as a private litigant, seeking redress for damage to a mail truck. Instead, it seeks to vindicate public rights stemming from alleged violations of criminal statutes. Where (as here) a contempt has both civil and criminal features, "the criminal feature of the order is dominant and fixes its character for purposes of review". *Union Tool Co.* v. *Wilson* (1922) 259 U.S. 107, 110.

Appealability is not determined by slogans. The rights asserted here amply meet the test of *Cohen* v. *Beneficial Loan Corp.* (1949) 357 U.S. 541, 546, in that they are procedural rights separable from and collateral to the gov-

ernment's claim to equitable relief. Even in civil matters, "the requirement of finality is to be given a practical rather than a technical construction". *Gillespie* v. *U. S. Steel Corp.* (1964) 379 U.S. 148, 152. This Court has recently provided a firm restatement of those principles, in a proceeding whose claim to finality was certainly no more compelling than are the contempt adjudications here. *Eisen* v. *Carlisle and Jacquelin* (1974) No. 73-203, 94 S.Ct. 2140, 2149.

Against these compelling authorities, the notion that these contempt adjudications are not final and appealable is jarring to the ears of both precedent and reason.

2.

The government contends that the only issue is whether the trial court abused its discretion. That argument seems somewhat misplaced as a response to petitioners' contentions that the order lacked a jurisdictional base and reflected a constitutionally invalid procedure.

The argument is not merely irrelevant, but lacks record support as well. The injunction order simply did not represent an exercise of discretion in any degree whatever. The district court rendered the injunction as an automatic response to a finding of default (App. 20-27), without hearing any evidence whatever, and in express rejection of the petitioners' arguments that some special circumstance must be shown in order to justify an injunction. The Court of Appeals likewise treated the injunction as automatic and expressly held that it was unnecessary to show any facts upon which a discretionary ruling might be based. Where discretion is not exercised, an order may not be affirmed merely because discretion could have been exercised. *United States* v. *Brown,* (2d Cir 1972)

470 F. 2d 285, 287-288; *Cf. United States* v. *Wells* (7 Cir. 1967) 387 F. 2d 807, 808.

3.

We think it completely beyond question that in the language of Rule 19 (b), the court below "has decided an important question of federal law which has not been, but should be settled by this Court". The government's brief in opposition does not appear to express any quarrel with that proposition. If that were not enough, we would further urge that it "has decided a federal question in a way in conflict with applicable decisions of this Court", and that it has both accomplished and sanctioned departure from the judicial norm of such magnitude, as to "call for an exercise of this Court's power of supervision". Rule 19(b).

The government states that there is as yet no conflict among circuits. There could hardly be such, since only one circuit has considered the problem.

But on January 17, 1975 the United States District Court for the Northern District of Illinois rendered an opinion basically inconsistent with the opinion here sought to be reviewed. *United States* v. *Finn,* U.S.D.C. N.D. Ill. E.D., Docket Number 74 C 2925, (certified copy herewith lodged with the Clerk, relevant portions reprinted as Appendix to this Reply). Conceding that it was bound by the decision here presented for review, the district court in *Finn* nevertheless stated that it was "clearly troubled by the inadequate attention which the Seventh Circuit gave to its discussion of *Boyd* [v. *United States* (1886) 116 U.S. 616, 634] and *In re Winship,* 397 U.S. 358 (1970). With no disrespect intended to our appellate court we think they bypassed the key issue underlying the thrust

of defendants' attack on the Organized Crime Control Act." (App. 2)[1]

The *Finn* court "conclude(s) that civil proceedings like those being conducted herein are subject to a criminal burden of proof," (App. 3), referring to them as "quasi-criminal" (App. 3). Its opinion accordingly holds the government to a reasonable doubt standard, and affirms the existence, in actions brought under Section 1962, of a primary Fifth Amendment right identical to that accorded in criminal cases.

Consistent with that view, the *Finn* court declined to order the defendants to respond to requests for admissions under Federal Civil Rule 36, even though such admissions are made "for purposes of the pending action only".

Although *Finn* purports to consider only areas not reached by the decision in this case, it is clear beyond argument that on the most fundamental issue here presented for resolution—does the defendant in such a "civil" case enjoy such criminal constitutional protections as the reasonable doubt standard and the full self-incrimination privilege?—the *Finn* court reaches a conclusion directly opposed to that expressed in the opinion below.

4.

Our petition contends that gambling does not come within Section 1962 unless the gambling proceeds are used to acquire or control another interstate enterprise whether legal or illegal. (Pet. 25-28) The government responds only that the infiltrated enterprise need not be a legiti-

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[1] Appendix references are to the *Finns* opinion reprinted in relevant part at the end of this Reply.

mate one (Brief in Opposition, pp. 10-11). We hope that your Honors will agree that the government has not responded in any degree to the point that we have made, and that the respondent's failure to discuss that issue should not prevent consideration of a matter of such significance.

5.

For the past several years, this Court repeatedly has expressed concern with the simple volume of federal litigation. Many recent decisions have tended to restrict that flow, particularly against the influx of minor and inconsequential claims. *Zahn* v. *International Paper Co.* (1973) 414 U.S. 271; *Eisen* v. *Carlisle and Jacquelin* (1974) No. 73-203, 94 S.Ct. 214, 40 L. Ed. 2d 732; Cf. *Gulf Oil* v. *Copp Paving,* No. 73-1012, 12/17/74, 43 L.W. 4059, and *American Radio Association* v. *Mobile Steamship Association,* No. 73-748, 12/17/74, 43 L.W. 4068.

In this case, the government operated a wiretap and discovered activity which must by any rational definition be called a small-time gambling operation. The wiretap is presumed legal. The government could simply have handed over its evidence to state authorities for criminal prosecution, thus ending the gambling activity. It could have filed routine federal criminal charges.

Instead, it invoked federal equitable process. The result must be not only protracted and complex district court litigation, but almost an unending period of collateral supervisory proceedings. It indignantly rejected any suggestion that any special circumstance need be shown as a condition or justification for such litigation—and in that view it was sustained.

Surely there can be no effective doctrine of judicial economy which does not embrace the activities of the

government, the most active single litigant in the federal system.

The government's attempt to justify the result below as a routine product of judicial discretion is untenable from the outset, as argued, because that discretion was never exercised. But if discretion is to be the test, we confidently invite this Court's consideration of that issue. If discretion can be said to have been employed below, it was assuredly exercised in a manner contrary to this Court's articulated philosophy.

Respectfully submitted,

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APPENDIX

APPENDIX

Filed Jan 17 1975
H. Stuart Cunningham, Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNTED STATES OF AMERICA,

Plaintiff,

vs.

CHARLES EDWARD FINN, JOEL MERVYN GLICKMAN, PHILIP THEODORE JANIS, and CALVIN SIRKIN,

Defendants.

NO. 74 C 2925

A True Copy Attest
H. Stuart Cunningham, Clerk
By /s/ Jeanette M. Grady
District Clerk
U.S. District Court
Northern District of Illinois
Date: Feb 3 1975

MEMORANDUM OPINION

Motion to Dismiss, Motion for Ruling on Sufficiency of Response to Requests for Admission, and Motion to Suppress.

Motion to Dismiss

The great majority of issues raised in this motion have already been resolved by the Seventh Circuit in *United*

States v. *Cappetto*, [502] F.2d [1351], No. 74-1350 (7th Cir. 1974), and though defendants seem aware that we are bound by this precedent, they nonetheless futilely attempt to re-argue the correctness of *Cappetto*. Defendants' energies are better saved for a proper court of review.

• • •

IV. Defendants also argue that §1964 creates a Bill of Attainder, and examines the cases of *Boyd* v. *United States*, 116 U.S. 616 (1886) and *United States* v. *Coin & Currency*, 401 U.S. 715 (1971). While we do not agree with defendants that §1964 creates such a bill, we do confess that we are greatly troubled by the inadequate attention which the Seventh Circuit gave to its discussion of *Boyd, supra*, and *In re Winship*, 397 U.S. 358 (1970). With no disrespect intended to our appellate court, we think they by-passed the key issue underlying the thrust of defendants' attack on the Organized Crime Control Act. *In re Debs*, 158 U.S. 564 (1895), leaves no doubt about the correctness of the *Cappetto* decision, insofar as that decision finds Congress' power to regulate activities affecting interstate commerce permits the creation of both civil actions and criminal prosecutions for the same act. 158 U.S. at 594. Our concern is what due process rights attend an action brought pursuant to 18 U.S.C. §1964. As defendants note, to be guilty of racketeering one must be engaging in criminal activities forbidden by 18 U.S.C. §§1084, 1952, or 1955. We fail to understand how a civil proceeding could be any more in substance a criminal one than the one herein. This is not to imply the unconstitutionality of 18 U.S.C. §1964, but rather to argue that *Boyd* compels that any proceedings of a quasi-criminal nature, like this one, are subject *inter alia*, to the strictures of the Fourth Amendment and that portion of the Fifth Amend-

ment dealing with self-incrimination. Further, under *In re Gault*, 387 U.S. 1 (1967) and *In re Winship, supra*, these proceedings must be subject to a standard of proof "beyond a reasonable doubt." The Court said in *Winship*, "It is . . . important that in a free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper factfinder of his guilt with utmost certainty." 397 U.S. at 364. The stigma which attaches at a delinquency proceeding is bottomed, to some extent, on a finding that the accused committed a crime. 397 U.S. at 374. The exact same stigma attaches to the enjoining of racketeering. See 18 U.S.C. §1961 (1)(B). Hence we conclude that civil proceedings like those being conducted herein are subject to a criminal burden of proof.

• • •

V. Finally, defendants argue that *Cappetto* and *Boyd* are factually distinguishable in a manner which makes *Boyd* the applicable precedent here, and not *Cappetto;* specifically, defendants contend that *Boyd* was distinguished in *Cappetto* because it was a forfeiture case, and that in *Finn* there are two forfeiture cases and a criminal case pending.

The short answer to this is that we consider both *Boyd* and *Cappetto* applicable to this case. *Boyd* says that certain forfeiture proceedings are quasi-criminal in nature and that certain constitutional rights attach to those proceedings. *Cappetto,* strictly construed, says that the Organized Crime Control Act is not unconstitutional simply because it allows for both civil actions and criminal prosecutions for the same acts. *Cappetto* does not speak to the due process rights to which defendant is entitled in the civil proceeding.

• • •

Motion for Ruling on Sufficency of Responses to Requests for Admissions

Plaintiff government objects to the sufficiency of defendants' answers to divers "requests to admit" which invoke the Fifth Amendment privilege against self-incrimination. One of the few cases directly on point, *Federal Deposit Insurance Corporation* v. *Logsdon,* 18 F.R.D. 57 (1955), holds that since neither Rule 36(b) nor any other statute guarantees a defendant absolute immunity from federal criminal prosecution, and since an admission may well become a vital, factual link in the chain of evidence necessary to establish the existence and commission of the crime for which one has been indicted and faces pending prosecution, requiring a defendant to give self-incriminating testimony would be violative of Fifth Amendment rights. Professor Wright, member of the Advisory Committee on Civil Rules to the Judicial Conference of the United States, agrees that the better view of Rule 36(b) is that a party in answering a request for admissions is entitled to the same constitutional protections as if he were called as a witness. 35 F.R.D. 39, 92. Finally, *United States* v. *Fishman,* 15 F.R.D. 51 (1953), indicates that the proper method of invoking the privilege is to answer the request for admissions by so claiming, as was done herein.

We find, then, that defendants' response to plaintiff's request is sufficient.

Enter:

/s/ *Abraham Lincoln Marovitz*
Judge

Dated: January 17, 1975